

QUARTERLY REPORT
OF THE
ATTORNEY GENERAL
OF
ALABAMA

For the Period

October 1, 1947

Through December 31, 1947

Volume No. 49

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from October 1, 1947, through December 31, 1947.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report to be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials.

Very respectfully,

A. A. CARMICHAEL,
Attorney General.

**QUARTERLY REPORT
OF THE
ATTORNEY GENERAL**
For the Period October 1, 1947
Through December 31, 1947

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OPINIONS



October 8, 1947.

Hon. Brooks Glass, Director,
Department of Commerce,
Montgomery 4, Alabama.
Licenses—Corporations—Insurance.

1. It is within legislative competence to toll Title 10, Section 109, Code of Alabama 1940, imposing a forfeiture for non-user of a corporation franchise.

2. The Legislature had the power to engraft upon Title 28, Section 246, Code of Alabama 1940, certain factual conditions which, in the absence of other negative factors, would authorize the issuance of a permit to operate a mutual aid, benefit or industrial insurance business theretofore denied under the statute.

3. Act Nos. 346 and 347, General Acts 1947, approved August 15, 1947, which amended Title 10, Section 109, and Title 28, Section 246, Code of Alabama 1940, respectively, are not ex post facto laws and do not violate the Constitution of Alabama 1901, Section 22.

4. Evidence that is reasonably satisfying as to the existence of factual conditions specified in amendatory Act Nos. 346 and 347, supra, would justify the issuance of a license to Southern Funeral Home, Inc., to resume business. The credibility and sufficiency of the evidence is addressed to the Director of the Department of Commerce. The quantum and character of legal evidence is addressed to the petitioners. Such evidence may be in the form of ex parte affidavits, documentary proof, oral testimony under oath, and authentic statements from the War Department or like authority.

5. It is the duty of the Director of the Department of Commerce to issue a license to the Southern Funeral Home, Inc., to resume business if he is reasonably satisfied that the factual conditions prescribed in Acts Nos. 346 and 347, supra, exist.

6. If the Southern Funeral Home, Inc., suspended operations, it would not have to pay, during the period of such suspension, the privilege license imposed by Title 51, Section 814, Code of Alabama 1940, and the 1935 General Revenue Act.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion bearing date of August 28, 1947, is as follows:

"We respectfully request your opinion on certain questions arising from the following statement of facts:

"On January 27, 1936, the Southern Funeral Company, Inc., was incorporated under the then existing laws governing mutual aid, benefit, or industrial or burial insurance business in Alabama and was subsequently licensed by the Bureau of Insurance to transact such an insurance business.

"Under date of January 27, 1937, the said Southern Funeral Company, Inc., re-insured and sold to Goldstucker Burial Association, Inc., all of its outstanding insurance contracts together with all papers and records incidental thereto, and thereupon ceased to do an insurance business in the State of Alabama. As a result of this sale the said Southern Funeral Company, Inc., made application to the Superintendent of Insurance of Alabama for the purpose of withdrawing its deposit with the State Treasurer of Alabama, said application stated in part 'that it is the intention of the undersigned to relinquish its said insurance business and to withdraw its said deposit.' Authority to withdraw the deposit was authorized under date of November 27, 1937 and the deposit was then withdrawn. Since that time until the present the said Southern Funeral Company, Inc. has not transacted the business of insurance in this State.

"During the latter part of 1942 or the early part of 1943 a representative of the Southern Funeral Company, Inc. made a verbal request of the Bureau of Insurance of Alabama for a license to transact an insurance business under the original charter granted to the said company. The original charter provided for a capitalization of \$5,000.00.

"This office refused to issue a license for the transaction of business at that time because Title 28, Section 246, of the Code of Alabama 1940, provides that no corporation shall be organized or commence business with a capital stock of less than \$25,000.00. As you will notice, Section 246, supra, makes this exception: 'Nothing contained in this Article shall be construed to require any corporation already organized as mutual aid, benefit, or industrial company or association, and doing business in this State, to increase its capital stock.' (Emphasis ours). This Act was passed in 1939.

"We further refused to license this company on the ground that the right to do an insurance business in the State of Alabama is a franchise granted by the Legislature of the State of Alabama and, on this assumption, that the said Southern Funeral Company, Inc. had forfeited its franchise for doing insurance business in Alabama, such forfeiture provided for in Title 10, Section 109, Code of Alabama 1940.

"During the month of February, 1947, representatives of the said Southern Funeral Company, Inc. again made application for

license to transact the business of insurance under its original charter and again this office refused to grant such license for the above stated reasons.

"Acts 347 and 346, both approved August 15, 1947, were passed during the 1947 Session of the Legislature amending Sections 246 and 109, *supra*, respectively. As a result of the passage of these Acts the said Southern Funeral Company, Inc. applied on August 27, 1947, for a license to transact the business of insurance in Alabama under its original charter granted in 1936.

"Before granting such license we respectfully request your opinion on the following questions:

"1. Is this Department correct in not issuing the license to the said Southern Funeral Company, Inc. under its original charter on the grounds that the privilege of doing an insurance business in this State is a franchise and that the non-use of this franchise for a continuous period in excess of five years is a forfeiture of such franchise and would prohibit us from issuing a license?

"2. If your answer to question one is in the negative, is this Department correct in refusing to grant the said Southern Funeral Company, Inc. a license on the grounds that the said company was not 'doing business in this State' as a mutual aid, benefit, or industrial company as provided for in Title 28, Section 246, Code of Alabama 1940 at the effective date of said Act?

"3. If your answers to both of the first two questions are in the negative then are either or both Act 346, *supra*, and Act 347, *supra*, in violation of Article 1, Section 22, of the 1901 Constitution of Alabama pertaining to *ex post facto* laws and as such, or for any other reason, unconstitutional?

"4. If your answers to the above three questions are in the negative, would temporary military services in the United States Army for periods ranging from two weeks to six months be considered sufficient to comply with Act 346, *supra*, and Act 347, *supra*, even though such temporary service in the armed forces existed at frequent intervals since before the corporation came into existence and during the time of its existence subsequent to its discontinuance of business?

"5. If you answer the first three questions in the negative, and question four in the affirmative, what evidence would be sufficient under Act 346, *supra*, and Act 347, *supra*, that entrance upon military service by one of its managing officers resulted in the temporary suspension of operations?

"6. If you answer the first three questions in the negative and question four in the affirmative (and assuming that affirmative proof

can be shown as referred to in question five), would the company be liable for the payment of the filing fee provided for in Title 51, Section 814, Code of Alabama 1940, for each year since 1936 as a prerequisite of granting of the license?

"Your early attention to this request will be appreciated."

Questions 1 and 2:

Title 10, Section 109, Code of Alabama 1940, provides that the non-user of a corporate franchise for a period of five consecutive years "is a forfeiture of such franchise." This was within legislative competence. Likewise, it was within the prerogative of the Legislature to amend this section of the Code by adding thereto the following proviso:

"Provided, however, that nothing herein contained shall be construed to constitute such voluntary non-use of a corporate franchise as to result in its forfeiture, if any of the managing officers of such corporation became engaged in or was called upon to render military services to the United States and thereafter, and as the result thereof such corporation temporarily suspended operations, and provided further that said corporation shall have paid all its franchise and other lawful taxes due the State of Alabama." (Act No. 346, General Acts 1947, approved August 15, 1947.)

This legislative modification created a factual exception that embraces several factors which will be discussed later in this opinion.

Title 28, Section 246, Code of Alabama 1940, reads as follows:

"Capital Stock.—No such corporation shall be organized with a capital stock of less than twenty-five thousand dollars, nor shall any such corporation be organized or commence business unless it has received not less than the sum of twenty-five thousand dollars in payment in cash for subscriptions to its capital stock. Nothing contained in this article shall be construed to require any corporation already organized as mutual aid, benefit, or industrial company or association, and doing business in this state, to increase its capital stock."

However, it was amended by the recent Legislature to read:

"Capital Stock. (A) No such corporation shall be organized with a capital stock of less than twenty-five thousand dollars, nor shall any such corporation be organized or commence business unless it has received not less than the sum of twenty-five thousand dollars in payment in cash for subscriptions to its capital stock. Nothing contained in this Article shall be construed to require any corporation already organized, under the laws of the State, as a mutual aid, benefit, or industrial company or association to increase its capital stock in the manner indicated. (B) No mutual aid, benefit or industrial

company or association heretofore lawfully organized under the laws of this State, with a capital stock of less than the sum of twenty-five thousand dollars, shall be denied a permit to do business in this State, if any managing officer of such corporation became engaged in or was called upon to render military services to the United States and thereafter, and as the result thereof, such corporation temporarily suspended operations; and provided further that said corporation shall have paid all franchise and other lawful taxes due the State of Alabama." (Act No. 347, General Acts 1947, approved August 15, 1947.)

If the factual conditions added to Title 10, Section 109, supra, by amendatory Act No. 346, supra, exist as to any managing officer of the Southern Funeral Home, Inc., then the statute as to non-user of the corporate franchise was tolled and there was no forfeiture.

If the factual conditions added to Title 28, Section 246, supra, by Act No. 347, supra, (identical to those added by Act No. 346, supra) exist as to any managing officer, then the Southern Funeral Home, Inc., would now be entitled to a license, per chance it was excluded under the statute, prior to amendment, from receiving a license.

Thus, it appears that the answers to questions 1 and 2 depend upon the factual conditions existing.

Question 3:

The amendatory acts aforementioned do not, in my judgment, violate the Constitution of Alabama 1901, Section 22, which reads as follows:

"That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment."

The ex post facto provision of this section applies only to criminal cases. *Bloodgood v. Cammack*, 5 Stew. & P. 276; *Elliott and Perkins v. Mayfield and Wife*, 4 Ala. 417; *Aldridge v. Tuscumbia, etc. R. Co.*, 2 Stew. & P. 199. The Legislature, by enacting Act Nos. 346 and 347, supra, has not made any irrevocable or exclusive grant of special privileges or immunities; nor did it violate that provision which reads "every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." Therefore, I answer this question in the negative.

Question 4:

Military service, either at intervals or continuously, of any managing officer of the Southern Funeral Home, Inc., is sufficient, under the provisions of amendatory Act No. 346, supra, to toll the statute and prevent

a forfeiture of the franchise, provided, of course, that such service caused this corporation temporarily to suspend operations, and provided further that said corporation shall have paid all the franchise and other lawful taxes due the State of Alabama. The same is true as to such service under the provisions of amendatory Act No. 347, supra.

Question 5:

It would be very difficult, if not impossible, for me to say what evidence would be sufficient to establish the existence of the factual conditions prescribed in the amendatory acts to which reference has already been made. I cannot foretell or guess with any degree of accuracy what proof will be submitted. For that reason, I cannot answer your question as framed. The quantum of the evidence necessary would be addressed to the petitioners; likewise, the character of the evidence would be so addressed. The credibility and sufficiency of this evidence would address itself to you. The form of the evidence could be oral (under oath), documentary, or by ex parte affidavits. Any authentic statement from the War Department or other military record could be offered to establish military service. If the proof offered is reasonably convincing as to truth with respect to the factual prescriptions set forth in the acts, then you should act favorably on the petition; if not, then you should deny the petition. The petition, on such denial, would have recourse to the courts to review your action.

Question 6:

Title 51, Section 814, Code of Alabama 1940, to which you refer, was originally enacted by the Legislature in 1935, and reads as follows:

"Filing fee.—At the time of filing the certified copy of the charter or articles of incorporation of such insurance company, together with the financial statement, the superintendent of insurance shall collect from such company the sum of two hundred dollars as a filing fee, to be paid into the treasury, and thereafter annually before the first day of March a similar annual statement shall be filed by the insurance company with the superintendent of insurance, and a like filing fee of two hundred dollars shall be collected for the use of the State of Alabama." (Schedule 160.2, Section 348, Act No. 194, Gen. Acts 1935, page 256—the 1935 General Revenue Act.)

This statute imposes a privilege license on each person, * * *, corporation, etc. engaging in the business of an insurance company.

Consequently, there would be no privilege license due by the Southern Funeral Home, Inc., for the years it suspended operations.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 8, 1947.

Hon. Joe F. Lewis,
President, Board of Commissioners,
Bessemer, Alabama.
Municipalities—Officers—Elections

When a municipality abandons a commission form of government and adopts an aldermanic form, the initial appointments of the mayor and aldermen are made by the Governor alone under Title 37, Section 126, Code of Alabama 1940, and this authority cannot be delegated. There is no provision of law authorizing a special or separate election to determine the names of these initial appointees.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of September 15, 1947, is as follows:

"There is now in circulation in this city a petition to abandon the commission form of government for the city and return to the mayor-aldermanic form, all under Article 3, Title 37, 1940 Code of Alabama.

"Will you kindly give me your opinion on the following propositions:

"(a) If the election is to abandon the present commission form of government and the result thereof is successful, would the Governor, under Section 126 of Title 37, have the exclusive right to appoint the mayor and aldermen for the city?

"(b) If you are of the opinion that the Governor does have the right to appoint the mayor and aldermen for the city, can the Governor delegate this authority to the Democratic Executive Committee for such city or to any other board?

"(c) If the voters of the city decide to abandon the commission form of government, is there existing authority for the city to hold an election wherein there would be elected a mayor and the requisite number of aldermen for the city?

"(d) If such an election as suggested in paragraph (c) hereof is authorized under law, would the result of the election be binding upon the appointing power of the Governor under Section 126?

"I thank you for an early consideration of this request."

Title 37, Chapter 4, Article 3 (Sections 120-133), Code of Alabama 1940, provides for the abandonment of a commission form of government and the return to an aldermanic form. Section 124, *supra*, provides for an election to determine whether or not the change shall be made. Under Section 125, *supra*, the method of conducting the election and declaring of results is set forth. Section 126, *supra*, reads as follows:

"§126. Appointment of mayor and aldermen.—The governor shall, within thirty days after receiving notice of the result of said election, appoint a mayor and the requisite number of aldermen who shall reside within the territorial limits of such city, and who shall possess the qualifications prescribed by law for such city, and who shall hold office thereafter until their successors are elected and qualified in the manner now or hereafter prescribed by law, at the next regular election."

Under the above quoted section, the Governor appoints the mayor and aldermen, who hold office until the qualification of the successors elected at the next regular election. It will be noted that the word "shall" is employed therein, which denotes a mandatory duty. In my opinion, the initial appointment of these officers is the sole prerogative of the Governor. He, and he alone, has authority to make the initial appointments, and this authority cannot be delegated. There is no provision of law authorizing a special or separate election for the purpose of determining the names of these initial appointees. The successors are elected at the next regular election.

In view of the foregoing, it follows that your inquiry "(a)" should be answered in the affirmative, and your inquiries "(b)" and "(c)" should be answered in the negative. The negative answer to your inquiry "(c)" precludes an answer to your inquiry "(d)".

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 8, 1947.

Hon. J. C. McGough,
Judge of Probate and Ex-Officio Chairman,
Commissioners' Court of Fayette County,
Fayette, Alabama.

Counties—Game and Fish.

Counties, under the authority of Title 12, Section 12(22), Code of Alabama 1940, as amended, or Act No. 350, General Acts 1945, page 565, have authority, through their governing bodies, to appropriate county funds for the establishment of a public fishing lake, in cooperation with the State Department of Conservation.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request dated September 16, 1947, for an official opinion, is as follows:

"The State Department of Conservation has located a public fishing lake in this County and proposes to construct, stock and maintain it for the use of the public.

"Upon making the survey for the site upon which this lake is to be located, the Director of Conservation asked for approximately 255 acres of land which was to be made the property of the State. The cost of this land is \$4,000.00 and the Commissioners' Court of Fayette County requests your opinion as to whether we can legally use County funds for purchase of this site for the purpose as set out above?

"Your opinion at your earliest convenience will be appreciated as we will need the information before making our annual budget."

County governing bodies are creatures of the Legislature and have no authority save that expressly, or by necessary implication, delegated by their creator. *Edwards v. Williamson*, 70 Ala. 145; *State v. Street*, 117 Ala. 203, 23 So. 807. See also, *Woodruff v. Beeland*, 220 Ala. 652, 127 So. 235; *Biennial Report of Attorney General*, 1928-30, page 57.

Title 12, Section 12, Code of Alabama 1940, defines the authority of courts of county commissioners. Subsection 22 thereof, as amended by Act No. 344, General Acts 1945, page 560, approved July 6, 1945, provides that the Court has authority:

"To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. The court is authorized to enter into contracts with any person, firm, corporation or association to carry out the purposes set forth in this subdivision."

In a previous opinion, I have construed this subsection as including authority to appropriate county funds for the construction and maintenance of state parks within the county. See *Biennial Report of Attorney General*, 1934-36, page 181.

Act No. 350, General Acts 1945, page 565, approved July 6, 1945, authorizes the governing body of any county or municipality, with a population not exceeding 100,000, to provide, through the establishment of a recreational board, recreational facilities and services which contribute

to the general welfare of the residents of the county or municipality. The act stipulates that it shall receive a liberal construction. (Fayette County has a population of less than 100,000).

In a previous opinion, I have construed Act No. 350, supra, to include authority to appropriate county funds for the construction of a swimming pool to be used by the inhabitants of a county and a municipality. See Quarterly Report of Attorney General, Vol. 46, page 149.

Therefore, I am of the opinion that Fayette County has authority, under both Act No. 350, supra, and Subsection 22, as amended, supra, to cooperate with the State Department of Conservation in establishing a public fishing lake for the use, convenience, and recreation of citizens of and visitors to this State.

I am of the further opinion that such a plan does not run afoul of the Constitution of Alabama 1901, Section 94, preventing county investment in private enterprise.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 8, 1947.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Houston County—Counties—Sheriffs.

Under Section 6 of Act No. 11, Local Acts 1945, page 8, approved May 19, 1945, the existence of an emergency authorizing additional deputy sheriffs is a matter to be decided jointly by the Board of Revenue of Houston County and the Sheriff thereof. When the emergency is properly determined, the Sheriff requests the number of such deputies that may be necessary, which may or may not be authorized by the Board.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, dated August 13, 1947, is as follows:

"Please refer to Act No. 11, Page 8, Local Acts of 1945, Section 6, and advise as follows:

"A. Does the Sheriff have the exclusive authority to determine whether there is an emergency, necessitating additional deputies?"

"B. Can the Sheriff determine under said Section that there exists a continuing emergency, due to an inadequate force of proper enforcement of the law; or, that due to the incidents of crime a special investigator, a finger print expert or undercover man is necessary and constitutes such an emergency as would authorize him to certify to the Board of Revenue that an emergency exists?"

"C. Upon filing such a certificate that an emergency exists under either of the above paragraphs, is it mandatory or discretionary for the Board of Revenue to appoint additional deputies?"

Your inquiries involve an interpretation of Section 6, Act No. 11, Local Acts 1945, page 10, approved May 19, 1945, which provides as follows:

"Section 6. That, when in the opinion of the Board of Revenue of Houston County, Alabama, and the Sheriff there exists an emergency necessitating additional Deputies for the period of the emergency then the Sheriff shall file with said Board of Revenue a request for the number of additional Deputies that may be necessary and the Board of Revenue may authorize such additional Deputies as in its discretion may be necessary and said Board of Revenue may fix the compensation of such Deputies, shall require that they be bonded and the compensation as fixed by the Board of Revenue together with their bond and premiums shall be paid out of the general funds of the county, except, that in cases where said Deputies are requested by individuals or corporations for the protection of such individual or corporate property, said Board of Revenue may require such individual or corporation to pay the bond premiums and compensation of such Deputy. The selections and appointments of such additional Deputies shall be made by the Sheriff of Houston County, Alabama."

Under this section the existence of an emergency, in my opinion, is a matter to be determined jointly by the Board of Revenue and the Sheriff. Neither the Board nor the Sheriff has authority to make such a determination without the concurrence of the other. When it is properly determined that the emergency exists, then the Sheriff files his request with the Board for the number of additional deputies which, in his opinion, may be necessary. The Board then may authorize such additional deputies as, in its discretion, may be necessary. In other words, the Board may or may not authorize and appoint the number requested by the Sheriff. Cf. Quarterly Report of Attorney General, Vol. 46, page 177.

In view of the foregoing, it follows that your inquiries "A" and "B" should be answered in the negative. The foregoing also precludes an answer to your inquiry "C".

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 8, 1947.

Hon. W. A. Owens, Superintendent,
Limestone County Board of Education,
Athens, Alabama.

Limestone County—Schools—County Superintendents of Education—Constitutionality—Words and Phrases.

1. Act No. 213, Local Acts 1947 (Ms); approved July 24, 1947, providing for and authorizing additional salary and expense allowance for County Superintendent of Education of Limestone County, inoperative as to incumbent during present term of office, as such would increase compensation during term in violation of Constitution of Alabama 1901, Section 281.

2. The term "per annum," as used in said act in connection with expense allowance, means office year.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of September 15, 1947, is as follows:

"I would like to have an opinion as to an Act introduced by Senator Patton and Representative Broadwater concerning salaries and expenses of Limestone County Superintendent of Education which was approved July 24, 1947.

"Sections 1 and 2 of No. 213 and S. 275. Has it become a law and what date could it be put into effect in Limestone County?

"I also wish to have an opinion as to the maximum amount which the Board of Education of Limestone County can set up as reimburseable for services rendered during any fiscal year."

Act No. 213, Local Acts 1947 (Ms), approved July 24, 1947, provides as follows:

"Section 1. The salary of the Superintendent of Education of Limestone County shall be fixed by the County Board of Education at a sum not to exceed three thousand and six hundred dollars (\$3,600) per annum. In addition to his salary, the superintendent shall be entitled to receive an allowance for expenses, which allowance shall be fixed by the board at not less than six hundred dollars (\$600) nor more than twelve hundred dollars (\$1,200) per annum.

"Section 2. This Act shall become effective on the first day of the calendar month following the date of enactment."

In connection with your first inquiry, it will be noted that the act shall become effective on the first day of the calendar month following the date of enactment, and the act was approved July 24, 1947. Therefore, the act became effective on August 1, 1947. However, in my opinion, the same is not applicable to the incumbent Superintendent of Limestone County during his present term of office.

I am informed by the State Department of Education that the incumbent Superintendent of Education of Limestone County began his present term of office on July 1, 1945, for a four year term. He now receives a salary of \$3,000 per annum under Act No. 306, Local Acts 1931, page 149, approved June 26, 1931, and an annual expense allowance of not exceeding \$600 under Title 52, Section 111, Code of Alabama 1940, as amended by Act No. 313, General Acts 1943, page 300.

The act under consideration authorizes an increase in the compensation of said Superintendent to not exceeding \$3600 per annum. The salary of the incumbent could not be increased thereunder during his present term of office without doing violence to Constitution of Alabama 1901, Section 281, which prohibits the increase of the salary or compensation of such officer during the term for which he shall have been elected or appointed. *McMurray v. Franklin County Board of Education*, 216 Ala. 144, 112 So. 644.

In my opinion, the same is true as to the expense allowance provided for in said act. It, in reality, authorizes an increase in compensation although under the guise of an expense allowance. A minimum allowance of \$600 per annum is required and a maximum of \$1200 per annum is authorized, regardless of the actual expenses incurred. The maximum expense allowance of \$600 per annum now authorized under the general law; viz. Title 52, Section 111, Code of Alabama 1940, as amended, *supra*, is for reimbursement for expenses incurred. To allow the present incumbent Superintendent of Education of Limestone County this additional expense allowance during his present term of office, would, in effect, be increasing his salary or compensation during said term in violation of Constitution of Alabama 1901, Section 281, *supra*.—Biennial Report of Attorney General, 1936-38, page 121.

In answer to your second inquiry, it is my opinion that the term "per annum," as used in connection with the expense allowance under consideration, means the office year or the year running concurrently with the years of the terms of office of the Superintendent of Education of Limestone County, viz. from July 1 of one year to July 1 of the next year.—Biennial Report of Attorney General, 1936-38, page 597.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 9, 1947.

Hon. Ralph P. Eagerton,
Chief Examiner of Public Accounts,
Department of Finance,
Montgomery 4, Alabama.

Sheriffs—Costs and Fees—Insane Persons.

Sheriff entitled to ten cents per mile per person in removing insane persons to State hospital. Act No. 575, General Acts 1943, page 578, approved July 7, 1943.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of September 5, 1947, is as follows:

"You are respectfully requested to furnish us an official opinion, interpreting provisions of Title 11, Section 100, Code of 1940, as amended by General Acts 1943, No. 575, Page 578, as to the following question:

"'Would the Sheriff be entitled to ten cents per mile for each insane conveyed on a single trip; in other words would the Sheriff be entitled to twenty cents per mile if he conveyed two insanes on a single trip?'"

"I would appreciate an early reply."

Act No. 575, General Acts 1943, page 578, approved July 7, 1943, referred to in your inquiry, is as follows:

"Section 1. The Sheriffs of the several Counties of the State of Alabama shall receive for arresting and taking into custody any person charged with being of unsound mind the following fees and mileage: \$5.00 for taking any such person into custody, and 10 cents per mile in removing any such person to a State Hospital for the insane; and such Sheriffs shall also receive the same fees for feeding insane prisoners as are allowed by the State for the feeding of other State prisoners.

"Section 2. The fees and mileage provided for in Section one hereof shall be paid from the general fund of the several counties and shall be paid in the same manner and way as other claims against said fund are paid.

"Section 3. This act shall take effect upon its approval by the Governor."

It is my opinion that under the provisions of the above statute the sheriff is entitled to ten cents per mile per person in transporting insane persons to a State hospital for the insane, whether the sheriff takes one or more persons at the same time. The ten cents per mile for removing an insane person to a State hospital for the insane is applicable to each insane person whom the sheriff removes to the State hospital, and the fact that he removes several insane persons at the same time and in the same automobile would not prevent him from receiving ten cents per mile for each insane person so removed.

Perhaps it should be added that mileage for the trip is calculated for a round trip, that is, such mileage should be calculated from the point where the journey to the hospital begins and return. See Quarterly Report of Attorney General, Vol. 33, page 7.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 9, 1947.

Hon. Ward W. McFarland,
State Highway Director,
State Highway Department,
CAPITOL.

Highways and Highway Department—Contracts.

1. Under the rules and regulations lawfully promulgated by the State Highway Department, the Director thereof is authorized to accept a contractor's unsigned bid which is regular in all other respects and is accompanied by a certified check in the amount specified by the Highway Department.

2. In the event such unsigned bid or proposal is accepted by the Director of the State Highway Department, both parties are thereupon bound by the terms thereof and, in the event the contractor fails or refuses to enter into contract as agreed, the Director of the State Highway Department may consider the proposal guaranty, the sum represented by the contractor's certified check, forfeited to the State of Alabama.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of October 6, 1947, is as follows:

"We have the following question which has arisen in connection with bids that were received at our letting of October 3, 1947.

"Contractor A has submitted a bid for a project in Etowah County and a bid for a project in Geneva County. Contractor A was the low bidder on both projects but the following notation was included in his bid: 'We do not wish to be awarded more than one of the above projects.'

"Contractor B submitted an unsigned bid for the Etowah County project and bids for other projects which were signed. The bids, in all instances, were made on proposal forms furnished by the Highway Department, carrying a serial number which was given the proposal at the time it was issued, with the notation that same was not transferable. His bid was also accompanied by a letter and a certified check in the proper amount. The letter stated: 'We do not wish to be awarded more than one grading job.' He also submitted a bid on another grading job.

"Contractor C submitted the second low bid on the Geneva County project and Contractor D submitted the third low bid on the Etowah County project. Following are the bids on the two projects by the four contractors:

"Project FAS 205(1), Etowah County

Contractor A.....	\$127,955.15
Contractor B.....	\$129,491.27 (Unsigned bid)
Contractor D.....	\$145,693.40

"Project SACP 734 A & B, Geneva County

Contractor A.....	\$190,108.29
Contractor C.....	\$195,513.79

"The unsigned bid which was submitted by Contractor B was not read at the letting but the tabulations were made in order that the proper determination in award of contracts might be made.

"If the bid submitted by Contractor B is considered a bona fide bid, then we should award the Geneva County project to Contractor A and award the Etowah County project to Contractor B. If the unsigned bid submitted by Contractor B is not considered a bona

fide bid, the award of the Etowah County project would necessarily have to be made to Contractor A and the award of the Geneva County project would have to be made to Contractor C, thereby increasing the cost to the State in the amount of \$3,869.38.

"I am enclosing the proposal form that was used by Contractor B in this case. Please return this proposal form as soon as possible.

"The following information is requested:

"1. Can the awarding authority accept a bid that is unsigned but accompanied by a certified check in the proper amount specified by the Department?

"2. In the event the contractor submits an unsigned bid which is accompanied by a certified check but refuses to accept the award of the contract, does the awarding authority have the right to cash the check of said bidder?"

The State Highway Department is charged by law with the duty of constructing, standardizing, repairing and maintaining the roads and bridges of the State. Such department is also authorized by statute to enter into contracts with individuals, firms or corporations for the performance of work in connection with the construction, repair or maintenance of the roads, bridges or highways of the State, it being further provided that all such contracts shall be made in the name of the State of Alabama and shall be approved by the Highway Department and the Governor.

Pursuant to such duty and authority, and acting in conformity with the further authority granted by Title 23, Sections 16 and 35, Code of Alabama 1940, the State Highway Department has promulgated certain rules and regulations prescribing the manner in which bids shall be received from contractors desiring to enter into contract with the State of Alabama for the construction or repair of roads and bridges, and the manner in which such contracts shall be awarded. Such rules and regulations will be found set out in Sections 2 and 3 of the Standard Specifications for Road and Bridge Construction, dated October 1, 1939.

These rules and regulations provide that all bids shall be submitted to the Director of the State Highway Department upon what are termed proposal forms, which forms are issued by the Highway Department only to those prospective bidders who have qualified with the Highway Department and have received a Certificate of Qualification under the terms of the existing laws of the State, it being further provided that such proposal forms be numbered serially and that such forms are not transferable. On such proposal forms a bidder shall specify, in the manner prescribed by such form, the terms upon which he will contract with the State for the designated work. It is further provided that no proposal will be considered unless accompanied by a properly certified check made payable to the Director of the State Highway Department in

the amount specified by that department, which check represents what is known as a proposal guaranty and is to be forfeited to the State of Alabama in the event of the failure of the bidder to enter into contract with the State should his proposal be accepted. It is also prescribed within such rules and regulations that such proposal shall be properly signed by the bidder in the manner indicated upon the form.

In your request for opinion, you state that you are in receipt of a bid from a contractor regular in all respects with the exception of being unsigned. Such bid bears upon its face the name of the company submitting such bid, carries the proper serial number of the proposal form issued to such bidder, and is accompanied by a letter signed by such bidder, along with the required certified check in the amount prescribed by the Highway Department.

You first inquire as to whether such bid may be accepted by the Highway Department. In my opinion, it may.

In my judgment, such bid is no more than an offer or proposal to enter into a contract with the State of Alabama under the conditions specified therein. An offer is defined as the signification by one person to another of his willingness to enter into a contract with him on the terms specified in the offer, a statement by the offeror of what he will give in return for some promise or act of the offeree. It is presumed that an offer invites the formation of a bilateral contract by acceptance. 17 C. J. S., Contracts, Section 35.

It is my opinion that an offer to enter into contract may be made in any manner agreeable to the parties concerned, and that there are no requisite formalities attached to the making of such an offer. An agreement to make and execute a certain written agreement, the terms of which are mutually understood and agreed on, is in all respects as valid and obligatory as the written contract itself would be if executed. If, therefore, it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of this contract are in all respects definitely understood and agreed on, and that a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement, which dates from the making of the oral agreement and not from the date of the subsequent writing, and neither party need accept, in the formal instrument, anything to which he has not already expressly or impliedly assented. This rule applies to the making of building and construction contracts. 17 C. J. S., Contracts, Sections 34 and 49.

In the instant case, the only formalities attached the submission of an offer to enter into contract are those prescribed by the State Highway Department as found set out within the Standard Specifications for Road and Bridge Construction. It is significant to note that these specifications reserve the right to the Director of the State Highway Department to

waive irregularities and technical errors found within the submitted proposals.

The first such right of waiver is found set out in Section 2.06 of the Standard Specifications, *supra*, and is as follows:

"Proposals may be rejected if they contain any omissions, alterations of form, additions not called for, conditional bids, alternate bids unless called for, incomplete bids, erasures, or irregularities of any kind. * * * *"

It is my opinion that such rule or regulation vests the Director of the State Highway Department with a discretion as to the waiver or non-waiver of irregularities in submitted bids. If such irregularity be waived by the Director, the bid may be accepted, and, if accepted, is binding upon each of the parties thereto.

The second reservation to the Director of the State Highway Department of the right of waiver of technical errors found in submitted bids is set out in Section 3.01 of the Standard Specifications, *supra*, in which it is provided that:

"* * * * Until the final award of the contract, however, the Director reserves the right to reject any and all proposals and to waive technical errors if, in the judgment of the Director, the best interest of the state will thereby be promoted."

This provision also grants to the Director of the State Highway Department the right to waive technical errors in submitted bids and if so waived, the bid may be accepted and, if accepted, is binding upon each of the parties thereto.

In the situation presented by your inquiry, it is my opinion that the contractor, or offeror, has indicated by both word and act its willingness to enter into contract under the terms set out in its submitted bid. This expression of intent is evinced by its submission, upon the proper form assigned such company of its offer to contract, by the letter accompanying said proposal, and lastly and perhaps most strongly, by its furnishing of the required certified check in the amount stipulated by the State Highway Department. All of these acts upon its part strongly and conclusively indicate an intent to make an offer to enter into contract with the State of Alabama under the terms specified in the proposal.

It is also apparent from an inspection of the submitted bid that the omission of signature therefrom was merely an oversight upon the part of the bidder, who has complied with the requirements of the State Highway Department in all other respects. In my opinion, the overt acts upon the part of the bidder are indicative of its intent to offer to enter into contract and that the failure to affix the signature to such

bid does not destroy its validity as an offer. It is also my further opinion that the Director of the State Highway Department is vested with the authority, should he so desire, to waive this irregularity and accept the offer of this bidder.

Your second inquiry is likewise answered in the affirmative. The contractor has submitted an offer to enter into contract with the State of Alabama under certain terms, understood by both parties. If such offer be accepted by the offeree, the State of Alabama, it is my opinion that both parties are then bound by the terms of the agreement. It is, therefore, my opinion that in the event a contractor submits an unsigned bid, in all other respects regular and accompanied by the required certified check of the contractor, which bid is accepted by you upon waiver of the irregularity, and such contractor then refuses to accept the award of the contract, the awarding authority is thereupon vested with the right, in conformity with the terms of the agreement, to cause the sum represented by the certified check to be forfeited to the State of Alabama.

I am returning the enclosure herewith.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 10, 1947.

Hon. G. Virgil Nunn,
Superintendent, Board of Education,
Fairfield, Alabama.

Schools—City Boards of Education—Funds—Bonds.

1. City Board of Education has no authority to make a loan to one of its teachers, as such would be lending the credit of an agency or subdivision of the State to a private individual in violation of the Constitution of Alabama 1901, Sections 93 and 94.

2. City Board of Education may invest surplus public school monies in cashable United States Government Bonds.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of September 23, 1947, is as follows:

"An opinion from your office is requested on the following matters:

"(1) We have a young man employed by the Fairfield City Board of Education who earns a good salary. His wife has just returned from a fifteen months stay in the hospital, his indebtedness for which is approximately \$5,000.00. Interested citizens have secured from the administration of the hospital a commitment that the account can be settled for a cash payment of \$2,000.00. The Board of Education would like to make a loan of this amount with a low rate of interest, to the young man, who will repay the Board of Education over a period of approximately 18 months. The Board in assisting this teacher to rid himself of this debt is not only rendering the man a service, but will also render the Board a service since we naturally can expect more efficient service from the individual concerned if he can rid himself of this heavy financial burden.

"Question: Does the Fairfield City Board of Education have the authority to make this loan from its funds?

"(2) At the conclusion of this fiscal year, September 30, 1947, Fairfield City Board of Education will have a balance of a few thousand dollars. Rather than to let this cash reserve lie idle it seems like good business to invest it in United States Government bonds.

"Question: Does the Fairfield City Board of Education have the authority to invest public school monies in United States Government Bonds?

"Your consideration and opinion on these matters will be greatly appreciated."

I am of the opinion that your first inquiry should be answered in the negative.

The Constitution of Alabama 1901, Sections 93 and 94, provide as follows:

"Sec. 93. The state shall not engage in works of internal improvement, nor lend money or its credit in aid of such; nor shall the state be interested in any private or corporate enterprise, or lend money or its credit to any individual, association, or corporation.

"Sec. 94. The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any such corporation, association, or company, by issuing bonds or otherwise."

The proposed plan outlined in your letter, if effectuated, would obviously be lending the credit of an agency or a subdivision of the State

(whichever a city board of education may be considered to be) to an individual in violation of the above quoted constitutional provisions. Cf. *Griffin v. Jeffers*, 221 Ala. 649, 130 So. 190.

Your second inquiry should be answered in the affirmative, provided the United States Government Bonds in which the public school monies are proposed to be invested are the types of bonds that are cashable at any time.

Although there is no specific authority for the investment under consideration, sound business practices would permit of same. United States Government Bonds represent the faith and credit of the United States, the foundation of all money values of this country.—*Taxpayers and Citizens v. Shelby County*, 246 Ala. 192, 20 So. 2d 36. Government Bonds, when cashable at any time, for all intents and purposes are equivalent to money.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 10, 1947.

Hon. Sim L. Howell, Chairman,
Morgan County Board of Revenue and Control
Decatur, Alabama.

Elections—Absentee Ballots—Statutes—Constitutionality.

Act No. 65, Local Acts 1947, approved July 7, 1947, which seeks to require Morgan County to grant compensation to person performing the duties of the judge of probate or sheriff with reference to the handling of absentee ballots when such officers were disqualified to serve is violative of Section 68, Constitution of Alabama 1901, and, therefore, void.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of August 27, 1947, is as follows:

"Enclosed herewith you will find copy of Act No. 65 (H. 260) approved by the Governor July 7, 1947.

"Please advise me whether or not this act violates Section 68 of the Constitution of Alabama."

The act to which you refer in your inquiry, Act No. 65, Local Acts 1947, approved July 1, 1947, copy of which is found attached to your request for opinion, is as follows:

"The governing body of Morgan County, Alabama shall pay to John H. Green the sum of Two Hundred Fifty Dollars out of the general fund of said county for services rendered by the said John H. Green at the primary elections held in Morgan County, Alabama in May and June, 1946, with reference to the handling of absentee ballots in said elections, and as compensation for his services in performing the duties of the Probate Judge with reference to receiving requests for absentee ballots, making a record of the same, and issuing absentee ballots in said elections, by reason of the fact that the Probate Judge and the Sheriff of Morgan County, Alabama were disqualified to perform said duties."

This act is nothing more than a private relief bill, providing for the payment, to one John H. Green, of the sum of two hundred and fifty dollars (\$250.00) out of the general fund of Morgan County for services rendered by the said Green in connection with the handling of absentee ballots in the primary elections of May and June 1946, further stating that the beneficiary, John H. Green, was called upon to render such service due to the fact that both the Judge of Probate and the Sheriff were disqualified to perform such duties.

You inquire as to whether such act is contrary to the provisions of Section 68, Constitution of Alabama 1901. The law of the state relative to absentee voting in primary, general and municipal elections is found set out in Act No. 478, General Acts 1945, page 711. Section 4 of this act provides in part as follows:

"* * * In any such primary, general or municipal election, when the judge of probate is a candidate for any office, he shall be disqualified from performing any of the duties in reference to the handling of absentee ballots which are herein imposed upon him, and all such duties shall be performed by the sheriff of said county. In the event the said sheriff is also a candidate in such election, the judge of probate shall, at least sixty-five days prior to the date of the election, certify said facts to the presiding judge of the circuit in which such county is located, and within five days thereafter such circuit judge shall appoint a qualified elector of such county, who is not a candidate for any office, to perform such duties. The sheriff, or, in the event he is disqualified as herein provided, the person so appointed by the circuit judge, is hereby authorized to perform all of the duties, with reference to the handling of the absentee ballots, herein required to be performed by the judge of probate."

A like provision (with certain exceptions not pertinent hereto) is found set out in Title 17, Section 6, Code of Alabama 1940, having been enacted by Act No. 178, General Acts 1933, page 193. Such section is, in effect, now superseded and replaced by the above quoted portion of Act No. 478, supra.

It is significant to note that in none of these statutes is there any provision made for the payment of compensation to a person performing

the duties of the judge of probate or sheriff in the event such officers are disqualified to handle absentee ballots.

It has also been held by former opinions of this office that a person performing the duties of the judge of probate or other officer disqualified from performing duties relative to absentee voting is not entitled to compensation therefor. Such holding was first announced in an opinion of this office rendered under date of May 22, 1934, Opinions of the Attorney General, Vol. 17, page 199, Office Ed., in which opinion is found the following statement:

"The Act makes no provision for compensation for the party handling the absentee ballots in accordance with the above cited provision of our absentee ballot law. A person accepting public office requiring the rendition of services takes the office cum onere and must render such services gratuitously unless by express statutory provision compensation is fixed and express liability for payment imposed.—Biennial Report of Attorney General, 1926-28, page 742 and cases cited."

Such holding has subsequently been reaffirmed by an opinion found in Quarterly Report of Attorney General, Vol. 10, page 193.

It is, therefore, my opinion that the person appointed by the Circuit Judge to perform the duties of the Judge of Probate or other officer disqualified from performing duties with reference to the handling of absentee ballots is not entitled to compensation for the services so rendered.

The question here presented is whether the Legislature may, by the enactment of a private relief bill, require the county governing body to pay from the general fund of the county a certain stipulated sum to the person performing the duties of the judge of probate or sheriff relative to the handling of absentee ballots, when those officers are disqualified to render such services.

It is my opinion that such an act violates that portion of Section 68, Constitution of Alabama 1901, which provides:

"The legislature shall have no power to grant or to authorize or require any county or municipal authority to grant, nor shall any county or municipal authority have power to grant any extra compensation, fee, or allowance to any public officer, servant, or employe, agent or contractor, after service shall have been rendered or contract made. * * * *"

Such act seeks to grant compensation to a public officer, servant, employee or agent after the service has been rendered and is therefore void. Biennial Report of Attorney General 1934-36, page 146. Biennial Report of Attorney General 1936-38, page 398.

As pointed out earlier herein, a person accepting a public office or position requiring the rendition of services takes such office or position cum onere and must render such services gratuitously unless there be some express provision for payment for such services. *State ex rel. McCaulley v. Stone*, 243 Ala. 18, 173 So. 871.

Such, in my opinion, is the current situation. The beneficiary of Act No. 65, supra, must be presumed to have accepted the appointment of the circuit judge with full knowledge that he was to receive no compensation for the services rendered by him in handling the absentee ballots. I know of no provision making it mandatory for one nominated by the circuit judge to handle absentee ballots to accept such appointment, nor do I find any penalty imposed against one for refusing to accept such appointment. Hence, it must be presumed that the person accepting such appointment did so knowing that he was to render gratuitous services in this regard. Consequently, it is my opinion that no obligation, either legal or moral, has ever existed for the payment of such services.

Such services do not fall within the definition of "ex officio services," which are excepted from the operation of the provisions of Section 68, supra. This is true because the duty of performing such service attaches to no office other than that of the judge of probate and the sheriff. If both of such officers be disqualified from rendering the service, the duty no longer devolves upon any officer but may be assigned to any qualified elector of the county appointed by the circuit judge.

Neither is the validity of such act saved by the fact that Section 68, supra, only prohibits the granting of "extra" compensation, fee or allowance to public officers, servants or employees, agents or contractors. The word "extra" is defined as having the meaning of something in addition to that which is expected, anticipated or provided for. In the instant case, the person performing the services in connection with the handling of absentee ballots could not have legitimately expected or anticipated any compensation for such services, nor is compensation provided for the rendering of such services. This being the case, the receipt of any compensation, fee or allowance for performing such services would be, in effect, the granting of extra compensation, fee or allowance.

It is, therefore, my opinion that any attempt, more than a year after the rendition of such services, to require the county to compensate a person for services heretofore gratuitously rendered would be in violation of the provision of Section 68, Constitution of Alabama 1901, which specifically states that the Legislature shall have no power to require any county to grant any extra compensation, fee or allowance to any public officer, servant or employe, agent or contractor after service shall have been rendered or contract made.

In view of the above, it is my opinion that Act No. 65, supra, must be held to be unconstitutional and void.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 10, 1947.

Hon. William T. Seibels,
Circuit Solicitor,
Fifteenth Judicial Circuit,
Montgomery 4, Alabama.

Lotteries.

Sales promotion campaign, sponsored by a soft drink manufacturer, which features a radio "Treasure Hunt" program in which cash prizes are awarded by chance to persons possessing cartons or cases of that drink, or reasonable facsimile thereof, is violative of the Constitution of Alabama 1901, Section 65, and Title 14, Section 275, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of September 8, 1947, is as follows:

"I am inclosing you for your inspection and judgment an inquiry which has been addressed to my office.

"I would like to get your opinion as to whether this is a lottery or not.

"Some years ago, one of these cola companies was conducting a like venture, and I was able to stop that on a suggestion.

"Would you call this a lottery?"

The enclosure submitted with your request consists of a card containing the following advertisement:

THE NEW EXCITING
PEPSI-COLA TREASURE HUNT
STARTS SEPT. 9TH

RADIO STATION WSFA
EVERY TUESDAY AND FRIDAY NIGHT
FREE—FREE—FREE
PEPSI-COLA CASH PEPSI-COLA

The Pepsi-Cola Bottling Company of Montgomery takes pleasure in announcing a NEW PEPSI-COLA TREASURE HUNT for your entertainment and enjoyment. One of the most interesting and exciting radio programs ever conceived, the PEPSI-COLA TREASURE HUNT will be heard over Radio Station WSFA each Tuesday and Friday night. There will be free Pepsi-Cola and from \$10 to \$200 will be offered on each program.

HERE'S ALL YOU HAVE TO DO
COSTS YOU NOTHING

Fill out the attached card and leave it with your favorite Pepsi-Cola dealer or take it to the Pepsi-Cola Bottling Co. THERE IS NO OBLIGATION ON YOUR PART AND IT COSTS YOU NOTHING TO FILL OUT THIS CARD. You do not need to fill out more than one card.

HERE'S WHAT WE DO

The entry cards will be picked up from the Pepsi-Cola dealers and placed on file. On each radio program, starting September 9th, a card will be selected from the files. The PEPSI-COLA TREASURE HUNT MAN will proceed to the address selected and on arrival there will offer to purchase a carton or a case of Pepsi-Cola, or a reasonable fac-simile of same, from the person whose name is on the card selected. Here is what he does:

1. If he is able to purchase a carton of Pepsi-Cola, or a reasonable fac-simile of same, he will offer from \$10 to \$100.
2. If he is able to purchase a case of Pepsi-Cola, or a reasonable facsimile of same, he will offer from \$20 to \$200.
3. In ANY EVENT THE TREASURE HUNT MAN WILL PRESENT THE PERSON ON WHOM HE CALLS WITH TWO CARTONS OF PEPSI-COLA FREE.

FILL IN YOUR CARD TODAY

"PEPSI-COLA TREASURE HUNT" ENTRY BLANK FOR
RADIO PROGRAM ON STATION WSFA EVERY
TUESDAY AND FRIDAY NIGHT

(Only Necessary to Sign One Card)

Name _____

Address _____

Dealer's Name _____

Dealer's Address _____

"PEPSI-COLA IS THE TREASURE OF THEM ALL"

Article 4, Section 65, Constitution of Alabama 1901, provides:

"The legislature shall have no power to authorize lotteries or gift enterprises for any purposes, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; and all acts, or parts of acts heretofore passed by the legislature of this state, authorizing a lottery or lotteries, and all acts amendatory thereof, or supplemental thereto, are hereby avoided."

Title 14, Section 275, Code of Alabama 1940, provides:

"Any person who sets up, carries on, or is concerned in setting up or carrying on any lottery or device of like kind, or any gift enterprises, or any scheme in the nature of a lottery or gift enterprise; or who sells or disposes of any lottery or gift enterprise ticket, or ticket in any scheme in the nature of a lottery or gift enterprise; or who shall receive money or take an order for any lottery or gift enterprise ticket, or any ticket in any scheme in the nature of a lottery or gift enterprise; or who is interested or concerned in selling or disposing of any ticket in any lottery or gift enterprise, or scheme in the nature of a lottery or gift enterprise; or who shall act for or represent any other person in selling or disposing of any such ticket, shall, on the first conviction, be fined not less than twenty-five nor more than five hundred dollars; and, on the second conviction, shall be fined not less than fifty nor more than five hundred dollars, and shall also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than thirty nor more than ninety days; and on the third or any subsequent conviction, shall be fined not less than one hundred nor more than one thousand dollars, and shall also be imprisoned in the county jail, or sentenced to hard labor for the county, for not less than six nor more than twelve months."

"Lotteries are not malum in se; they are merely malum prohibition. * * * * Only such lotteries are criminal as are set up or carried on without authority of law." *Broadbent v. Tuskaloosa Scientific Art Ass'n.*, 45 Alabama 170.

But lotteries, or any scheme in the nature of a lottery, are emphatically against the public policy of Alabama.—*Try-Me Bottling Company v. State*, 235 Ala. 207, 178 So. 231.

The courts of this state have defined a "lottery," or scheme in the nature of a lottery, as a plan in which a prize is set up and awarded by chance, for the right to participate in which a consideration is paid. A lottery has three elements: (1) A prize (2) awarded by chance (3) for a consideration.—*Grimes v. State*, 28 Ala. App. 4, 178 So. 69, Cert. Den. 235 Ala. 192, 178 So. 73; Biennial Report of Attorney General, 1936-38, page 523. Under Section 275, supra, payment of a consideration is necessary. *Yellow-Stone Kit v. State*, 88 Ala. 196, 7 So. 338. Where these

three elements coexist, it is immaterial by what name the venture is called.—*Grimes v. State*, supra.

Under the facts of the case presented, the presence of the first two elements of a lottery, i.e., a prize, awarded by chance, is without dispute. The question to be considered is, therefore, whether or not there is here a consideration within the spirit and purpose of our lottery laws. In considering this question, it should be kept in mind that a penal statute is directed to the operator. Is there a consideration moving to him? Your attention is invited to the fact that there is here involved a sales promotion scheme sponsored by a business enterprise and intended to swell its receipts from sales of "Pepsi-Cola," which evidences an intention to garner a profit from the gift enterprise. For practical purposes, the measure of the consideration moving to the sponsor is increased income.

Obviously, the increased income above noted must come from increased sales. Paid for what? Paid for the chance to draw the cash prize. Thus, the hazarding of money with the hope of obtaining more money by chance is of the essence of the scheme.

I think it would be of no consequence whether the sponsor has figured just how much of the cost of a carton or case of "Pepsi-Cola" is paid for the chance. "Gift enterprise" in the nature of a lottery definitely covers a lottery in aid of legitimate business, through colorable gifts, but in fact prizes awarded by chance for a price. The success of the plan is in swelling the sales and consequent income through the scheme of chance, and is the final proof of a consideration paid and a consideration received.

It is idle to argue that the retail consumer pays nothing for the chance. The publicity attending the "Treasure Hunt" radio program, with the added attraction of the chance, tends to induce the consumer to buy "Pepsi-Cola" to the exclusion of other drinks. It is no answer to say that he would have bought "Pepsi-Cola" regardless. Unless sales are increased, the program has no object. Thus, the fact that the retail sales price of the drink is not increased does not alter the character of the scheme, inasmuch as the price paid entitles the consumer to prize eligibility as well as to the cartons or cases of the drink. He pays his consideration when he buys his merchandise. Mutuality of risk is not necessary to constitute a lottery. *Jorman v. State*, 54 Ga. App. 738, 188 S. E. 925.

I am of the opinion, therefore, that there is here involved a gift enterprise in the nature of a lottery, in which a definite consideration is paid by the consumer for a chance to participate in the prize, and that the scheme is in violation of Constitution of Alabama 1901, Section 65, and Title 14, Section 275, Code of Alabama 1940.—*Cf. Opinion of the Justices*, (Ms), September 8, 1947.

The fact that the cash prize may be awarded to the holder of a "reasonable facsimile" of the articles under consideration, in my opinion, does not alter the above conclusion. Such is a mere attempt to bring the scheme without the influence of the Constitution and statute. In practically every instance there is a consideration paid by the participant through the purchase of the drink itself. The facsimile feature is merely an incidental part of the scheme and of no moment in the actual operation thereof. The law abhors dodgers and will not tolerate subterfuges. *Johnston v. State*, 16 Ala. App. 425, 78 So. 419; *In re Opinions of the Justices*, 225 Ala. 502, 144 So. 111.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 10, 1947.

Hon. J. R. Ekblad, Chairman,
Waterworks Commission,
Town Council,
Chilton County,
Thorsby, Alabama.

Municipalities—Public Service Commission.

1. Under Title 48, Section 18, Code of Alabama 1940, and Title 37, Section 334, Code of Alabama 1940, incorporated municipalities are vested with exclusive authority in the fixation of service charges for utilities owned and operated by said municipalities, and a ten percent penalty for bills delinquent over fourteen days is held not to be an unreasonable charge.

2. The State police power cannot be abridged or suspended by contract, and the jurisdictional authority of the Alabama Public Service Commission to fix service charges of privately owned utilities cannot be ousted by a contractual agreement between a municipality and a privately owned utility fixing said service charges.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion bearing date of August 20, 1947, is as follows:

"Our Town Council desires your assistance in a legal matter.

"In our waterworks ordinance, we have provided for a penalty of ten (10) percent on a customer's bill, if he doesn't pay his bill

between the 1st and the 14th of the calendar month in which bill is due. Bills are sent each customer in the first three days of the calendar month. The question has arisen if the Town Council has the authority to collect these penalties for delinquent collections after the 14th day for past bills. Does the Town Council have the power to levy this ten percent delinquent charge?

"P. S. The customers refer to a decision of Public Service Commission denying the Alabama Power Company to collect them."

You do not state in your request for an official opinion whether the town of Thorsby owns and operates the waterworks referred to or whether a contractual arrangement for a water supply for its inhabitants has been made by the town with a privately owned utility.

In the event the town of Thorsby owns and operates the waterworks in question, your attention is directed to Title 48, Section 18, Code of Alabama 1940, which reads as follows:

"The public service commission shall have general supervision of all persons, firms, corporations, operating utilities, mentioned in this title, shall inquire into the management of the business, and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such utilities as often as may be necessary to keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property are owned, leased, controlled, managed, conducted, and operated, not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this title, and any other law or laws, with the orders of the commission, and with the charter and franchise requirements. It shall assemble and keep on file, available for the use of the public, full statistics on the foregoing, as well as on all other matters or things connected with such utilities as is necessary to a full knowledge of their business and affairs. Provided, however, that nothing contained in this title shall be deemed to confer upon the commission, power and jurisdiction to regulate and supervise any utility owned and operated by any municipal corporation in the state." (Emphasis supplied).

Title 37, Section 334, Code of Alabama 1940, which deals with municipal water systems, further provides in part as follows:

"Rates charged for services furnished by any system or combined system purchased, constructed, improved, enlarged, extended or repaired under the provisions of this subdivision shall not be subject to supervision or regulation by any state bureau, board, commission or other like instrumentality or agency thereof, * * *."

In an interpretation of the above statutes, the Supreme Court of Alabama in the case of *Mitchell v. City of Mobile*, 244 Ala. 442, 13 So. 2d 664, held as follows:

"Our general statutes vest in cities exclusive authority in the fixation of rates for city-owned utilities."

See also *Culpepper v. Phenix City*, 216 Ala. 318, 113 So. 56.

It is, therefore, my opinion that unless penalties for delinquent water bill payments are so arbitrarily unreasonable and unjust as to violate basic rights of private individuals under our State and Federal Constitutions, such penalties are purely discretionary with the municipality under its exclusive service charging powers. It is my further opinion that a ten percent penalty does not constitute an unjust discrimination under the facts stated.

You do not give the citation of the decision which certain customers are raising against the payment of the penalty. However, the basis of this decision is very likely founded on the principle laid down in the case of *Alabama Water Company vs. Attalla*, 211 Ala. 301, 100 So. 490. In this case, it is stated in effect that the police power of the State cannot be abridged or suspended by contract, and the Public Service Commission is empowered to fix rates to be charged by a water company notwithstanding a lease arrangement between a city and a company fixing rates, since the city has no power by such a lease to deprive the legislature, through its agent, the Public Service Commission, of its jurisdictional authority.

It can thus be seen that the ownership and operation of the waterworks is the determining factor in answering such a question as you present.

Your question is, therefore, answered in the affirmative, if the town of Thorsby owns and operates the waterworks referred to.

If the town of Thorsby merely has a contractual arrangement for water supply with a private utility, the rates are subject to the exclusive control of the Public Service Commission. The Public Service Commission, incidentally, has no such rule allowing a ten percent penalty charge on delinquent payments. See Alabama Public Service Commission General Rules, effective January 1, 1936, and amendments thereto. Therefore, your question is answered in the negative, if the town of Thorsby does not own and operate the waterworks under discussion.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 10, 1947.

Hon. Bert E. Thomas, Director,
Department of Conservation,
Montgomery 4, Alabama.

Counties—Conservation—Game and Fish.

1. The Director of the Department of Conservation, with the approval of the Governor, may accept a check from a county for the purpose of acquiring land in order to construct a public fishing lake. Title 8, Section 25, Code of Alabama 1940.

2. A check made by a county payable to the Department of Conservation for the purpose of acquiring land for the construction of a public fishing lake may be properly paid into the Game, Fish and Seafoods Fund and disbursed out of said fund for the purchase of said land. Act No. 230, General Acts 1945, page 352.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of September 8, 1947, is as follows:

"The Department of Conservation anticipates the construction of a public fishing lake in Butler County, Alabama. In conformity with the policies of this Department, it is necessary that the land on which the lake is constructed be donated without cost to the State of Alabama for the use and benefit of the Department of Conservation.

"Negotiations were made and completed with the Court of County Commissioners of Butler County whereby said Court would purchase with county funds the land to be used for the public fishing lake.

"On 1 September 1947, the Court of County Commissioners of Butler County, Alabama, sent to the Department of Conservation its check in the amount of \$500.00, payable to the State Department of Conservation, Division of Game and Fisheries, for the purchase price of the land in question. According to this letter, this check was a contribution authorized by the Commissioners Court of the County for the purchase of the land. The letter instructed this Department to accept the check for \$500.00, and, in turn, have a State Warrant issued in a like sum to the vendor of the land.

"It is my understanding that the Court of County Commissioners of Butler County is without authority to purchase land in its name

to be later deeded to the State of Alabama for the use and benefit of the Department of Conservation, and for this reason the check in the amount of \$500.00 was sent to this Department for direct negotiations with the vendor.

"I should like to have your official opinion as to whether or not this Department is authorized by law to endorse said check and cover same into the Game, Fish and Seafoods Fund of the Department of Conservation, and thereafter cause a State Warrant to be issued in a like amount for the purchase of the property in question.

"Your usual prompt attention in handling such matters will be deeply appreciated."

In my opinion, the procedure for the purchase of the land referred to in your inquiry may be followed. In other words, it is my opinion that the Department of Conservation is authorized to endorse the check referred to and pay it into the Game, Fish and Seafoods Fund, and thereafter cause a State warrant to be issued for the purchase of the property in question.

Butler County is authorized to acquire lands and facilities for recreational purposes, and accept financial and other aid for recreational purposes from any public or private agency. Act No. 350, General Acts 1945, page 565, Section 5. See also opinion to Hon. J. C. McGough, Judge of Probate, Fayette County, under date of October 8, 1947 (a copy of which is enclosed for your information), and Title 12, Section 12, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, approved July 6, 1945.

The Director of the Department of Conservation, with the approval of the Governor, may acquire title to or control of lands suitable for the protection and propagation of game and fish, or for fishing purposes. Such purchases are required to be made subject to the provisions of Title 55, Chapter 4, Code of Alabama 1940. Title 8, Section 25, Code of Alabama 1940.

The check referred to in your inquiry is plainly intended for the purpose of acquiring land in order to construct a public fishing lake.

From the above cited statutes, it is apparent that the county is authorized to make this appropriation, and that the Director of Conservation, with the approval of the Governor, is authorized to acquire title to the land. Title 8, Section 25, Code of Alabama 1940.

The Game, Fish and Seafoods Fund is created by Act No. 230, General Acts 1945, page 352. This fund, among other items, consists of "(f) all moneys accruing to the Game, Fish and Seafoods Division of the

Department of Conservation from any source; . . ." See Section 1 of Act No. 230, supra.

The check referred to in your inquiry, in my judgment, should be paid into the Game, Fish and Seafoods Fund under the provisions of subsection (f) above quoted. Such fund may be disbursed according to the provisions of Section 3 of Act No. 230, supra, which provides as follows:

"Section 3. That the said Fund hereby created shall be used and expended by the Director of Conservation in furtherance of the preservation, protection, propagation, and development of wild birds, wild fur-bearing animals, game, fish, salt water fish, shrimp, oysters, and other shell fish, crustaceans, and all other species of wildlife within the State or within the territorial jurisdiction of the State which have not been reduced to private ownership, and when so expended shall be paid out on the requisition of the Director of Conservation and charged to said Fund. All necessary expenses of the Division of Game, Fish and Seafoods of the Department of Conservation, including its pro rata portion of the administrative expense of said Department shall likewise be paid out of said Fund on the requisition of the Director of Conservation."

It is also noted that the Legislature, in the general appropriation bill, Act No. 320, General Acts 1947 (Ms.), approved August 15, 1947, provided an appropriation as follows:

"XIV. DEPARTMENT OF CONSERVATION:

"(a) Game, Fish, and Seafoods Division—As provided in Act No. 230, approved July 9, 1945."

Since the county is authorized to acquire lands for recreational purposes, and to cooperate with other public agencies in the establishment of recreational facilities, and since the Director of Conservation, as shown above, is authorized to expend funds in the Game, Fish and Seafoods Fund, it is my opinion that the check may be paid into the Game, Fish and Seafoods Fund, and that a State warrant may be issued to purchase the land in question.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 10, 1947.

Hon. O. L. Andrews, Clerk,
Circuit Court, Jefferson County,
Tenth Judicial Circuit of Alabama,
Birmingham, Alabama.

Costs and Fees—Clerks of Circuit Courts—Bonds—Appeals.

Circuit Clerk is not authorized to charge any fee for approving an appeal bond in a criminal case.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion bearing date of September 9, 1947, is as follows:

"Under Title 15—Section 372, the Clerk is required to approve appeal bonds when the defendant has given notice to the Court of Appeals and the Judge has fixed the amount of the appeal bond to be approved by the clerk. For approving these appeal bonds to the Court of Appeals, as the law requires, is the clerk authorized to charge one dollar (\$1.00) for approving these bonds?

"Your prompt attention to this question will be appreciated."

In my opinion, your question should be answered in the negative.

I have been unable to find any law authorizing the payment of any fee to a circuit clerk for approving an appeal bond in a criminal case.

The law of costs and fees is penal and must be strictly construed. An officer claiming a fee must point to specific authority therefor. Title 11, Section 1, Code of Alabama 1940, provides as follows:

"§ 1. No fee charged unless expressly authorized.—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. No provision of this title shall repeal any statute relating to costs or fees, which by its express terms was not intended to apply to all the counties of this State."

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 10, 1947.

Hon. Rascoe Maddox, Mayor,
Town of Thorsby,
Chilton County,
Thorsby, Alabama.

Municipalities.

Town of Thorsby does not have authority to purchase with municipal funds tract of land for the purpose of having said land available for future factories or other concerns seeking locations in Thorsby.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of June 6, 1947, is as follows:

"The Town of Thorsby is interested in owning a 149 acre tract of land lying just one-fourth mile north of the present town boundary. The purpose in acquiring this land would be to have it available for a factory, college, or other concern seeking a location here.

"Does the Town of Thorsby have the authority to purchase this land paying for same from the town funds?"

In my opinion, your request should be answered in the negative. I have been unable to find any express or implied authority for a municipality to purchase with municipal funds real estate for the purposes outlined in your request.

Municipal corporations are strictly political institutions with all of their purposes and objects public. Every municipal corporation derives all of its power from the State, and it can do only what the State Constitution and Legislature entrusts to it. It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise only the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared object and purposes of the corporation not simply convenient but indispensable. 1 Dillon on Municipal Corporations, Section 89; 42 Am. Rep. 118; State ex rel. Austin et al. v. City of Mobile et al, 248 Ala. 467, 28 So. 2d 177; Flitts v. Commission of City of Birmingham, 224 Ala. 600, 141 So. 354; Cleveland School Furniture Co. v. Greenville, 146 Ala. 559, 41 So. 862; Gambill v. Endrick Bros., 143 Ala. 506, 39 So. 297.

Section 376 of McQuillin on Municipal Corporations, Second Edition, Revised, Vol. 1, at page 1040, provides, in part, as follows:

"§ 376. Municipal power cannot be used for private purposes. It is elementary that the powers of a municipal corporation may be used for public or municipal purposes only. A municipal corporation is a public institution created to promote public, as distinguished from private, objects. All its powers, property and offices constitute a public trust to be administered by its authorities and public servants for the time being as such public trust, and not to aid private business ventures. This familiar and salutary principle has been stated in various forms by courts of last resort of the higher character.

"The law was early declared, and never questioned, that a municipal corporation cannot use its powers or funds to encourage the establishment and operation of private manufacturing or industrial plants within or near its limits. Nor can it aid any private manufacturing enterprise indirectly under the guise of performing municipal service. * * * * *

"The above examples are sufficient to illustrate the universal doctrine that the powers of the municipal corporation must be employed only for public purposes or objects. Aiding manufacturers is not such public purpose. As observed by the Supreme Court of the United States: 'If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving of the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town.'

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 10, 1947.

Hon. H. M. Touart,
Tax Assessor,
Mobile County,
Mobile, Alabama.

Taxation—Exemptions.

1. The exemption provided in Title 51, Section 6, Code of Alabama 1940, from ad valorem tax for state purposes of the additions, extensions and betterments involving not less than \$50,000 within any twelve months period made to any factory, mill, or plant, after September 13, 1939, is limited to additions,

extensions, and betterments made to the types of factories, mills, or plants specifically described in said section.

2. Quarterly Report of Attorney General, Vol. 42, page 15, overruled.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of May 1, 1947, is as follows:

"Your official opinion is respectfully requested on the pertinent sections of Chapter 2, Title 51, Code of Alabama 1940, dealing with ad valorem tax exemption of industrial plants as the same might apply to certain additions, betterments or extensions to the plant of the American Cyanamid Company, presently in the process of construction in this County.

"The American Cyanamid Company is engaged in the manufacture of aluminum sulfate from aluminum ore, or bauxite, and its original plant was, under a former ruling of the Attorney General, declared exempt from state, county and municipal ad valorem taxes for a period of ten years from the commencement of construction of the plant (opinion of Attorney General, March 29, 1940—Quar. Rep. Atty. Gen. Jan-Mar, 1940, page 396). As disclosed by the facts on which the former ruling was based and the research done at that time, aluminum sulfate is an aluminum product prepared by the action of sulphuric acid on metal aluminum.

"The American Cyanamid Company has, heretofore, purchased from other sources the sulphuric acid used in this process but is now constructing an additional unit to its plant for the purpose of manufacturing its own sulphuric acid. This addition, improvement or betterment is connected to the original plant by means of a pipeline through which the sulphuric acid is to be pumped to the vats containing the aluminum ore, and the units are also joined by common steam and water pipes and have a common source of electric current. The addition in question will cost in excess of \$50,000.00 and will be completed within a 12-month period after the beginning of the work.

"The latter part of Section 6 of Title 51 of the Code provides that the tax exemption provided for 'in this chapter' shall apply to any addition, extension or betterment erected or constructed after September 13, 1939, to any existing plant or factory. Former rulings of the Attorney General hold that the latter part of said Section 6 is separate and independent of the first part of the Section, Jan. 9, '46, (Quar. Rep. Atty. Gen. 1946, page 15). Section 10 of Title 51 is, of course, part of the same chapter and exempts from state, county

and municipal taxation plants manufacturing aluminum products for ten years after the beginning of the construction of the plant.

"I would, therefore, appreciate it if you would advise me:

"1. Whether the above mentioned addition to the plant of the American Cyanamid Company is exempt from state, county and municipal taxes for a period of ten years after the beginning of construction of the original plant; or

"2. Whether said extension, betterment or addition is exempt from such taxation for a period of ten years after the beginning of construction of such addition or extension."

In answer to questions 1 and 2 submitted by you, it is my opinion that the addition or extension described by you is subject to state, county and municipal taxes. It is not exempt for any period of time.

Your request for an opinion is based upon Quarterly Report of Attorney General, Vol. 42, page 15, dated January 9, 1946. This opinion states that the proviso of Title 51, Section 6, Code of Alabama 1940, to the effect that an addition or extension made after September 13, 1939, to "Any existing factory, mill, or plant" in an amount not less than \$50,000 shall be exempt from taxation as provided in the chapter containing said Section 6, is not limited to the types of factories, mills, and plants specifically enumerated in Section 6, *supra*. If this opinion is correct, the extension or improvement described by you in your request for an opinion would be exempt from the levy of ad valorem taxes for state purposes, and possibly county and municipal taxes also.

It is my belief, however, that the holding in the official opinion of January 9, 1946, *supra*, is incorrect and should be overruled.

Provisos in a section or clause should not be extended in their meaning beyond the subject matter of such section or clause, in the absence of a clear legislative intent that such proviso should have a broader application than the clause or section of which it is a part. The rule of interpretation in this regard is stated in the case of *Wartensleben v. Halthcock*, 80 Ala. 565, 1 So. 38:

"Generally, the appropriate office of a proviso is to restrain or modify the enacting clause, or preceding matter, and should be confined to what precedes, unless the intention, that it shall apply to some other matter, is apparent. When from the context, and a comparison of all the provisions relating to the same subject-matter, it is manifest, that the object and intent were to give the proviso a scope extending beyond the section, and effect beyond the phrase immediately preceding, it will be construed as restraining or qualifying preceding sections relating to the subject-matter of the proviso, or as tantamount to an enactment in a separate section, without regard to its position and connection."

This rule of interpretation is followed in the case of *Cooper v. State*, 28 Ala. App. 422, 187 So. 500, cert. denied 237 Ala. 533, 187 So. 503.

Section 6, *supra*, provides that the department of revenue may exempt from the levy of ad valorem taxes for state purposes for a period not exceeding ten years certain specified factories, mills and plants and extensions or additions thereto.

The reason for granting this exemption is stated in the beginning of Section 6 to be "for the purpose of developing a market for Alabama pine and other trees and the products thereof, and of encouraging the construction, extension and operation of factories and plants for the manufacture or production of pulp * * * products, * * *." Similar reasons are stated for the other types of industries enumerated in the section. After describing the industries which are to be encouraged within this state, Section 6 grants an exemption thereof from ad valorem taxes for state purposes. The section then sets forth two provisos. The first is as follows:

"Provided that said exemption and remission shall not apply to property which, after September 13, 1939, constitutes any factory, mill or plant, already erected or constructed within the state."

This proviso is limited to the factories, mills, or plants immediately described above, as is indicated by the use of the expression "said exemption and remission."

A second proviso immediately follows the first and is in the following language:

"Provided, however, that if after September 13, 1939, any existing factory, mill, or plant, or the owner thereof, shall erect or construct any addition, extension or betterment, or shall complete the construction of any addition, extension or betterment whensoever begun, or shall erect or construct another or additional unit, or units, whensoever begun, to such existing factory or plant, involving an expenditure, of an amount not less than fifty thousand dollars within any twelve months period, in constructing and equipping such extension, betterment, unit or addition within the State of Alabama, including the works, machinery and all other equipment constituting a part of, or used in connection with, such extension, unit betterment, or addition, the exemption and remittance provided for in this chapter shall apply to so much of said extension, addition or betterment, and additional units erected, constructed or completed, after September 13, 1939, including the works, machinery and other equipment constituting a part of or used in connection with the same."

In my opinion, the second proviso is likewise limited to the industries enumerated in Section 6. The second proviso contains the same

limiting date, namely, September 13, 1939, and refers to the same subject-matter as the first, namely, "factory, mill, or plant."

The purpose of the second proviso is to place limitations upon the field of operation of the exemption granted in Section 6 to each such factory and plant specified and "extension thereof or addition thereto, * * *." These limitations are that the addition or extension shall be erected after September 13, 1939; and that it shall involve an expenditure of not less than \$50,000 within any twelve months period.

Section 7, which immediately follows Section 6, provides the means for obtaining the benefit of the exemption and remittance "provided for in the preceding section." Application must be made in writing to the department of revenue stating certain information. It is also provided that the application shall state the location and a general description of the factory or plant, "or extension thereof, or addition thereto, * * * * * or the proposed extension thereof, or addition thereto, as the case may be, * * * * *."

Section 8 provides that a cessation of operation of the plant or factory for a period of six consecutive calendar months shall suspend the exemption; provided, however, that should operation be resumed at any time thereafter, the department of revenue may grant a new period of exemption and remission.

Following the general rule of construction that exemptions from taxation are strictly construed against the taxpayer, it would be a strained construction to hold that the second proviso of Section 6 authorizes an exemption from ad valorem taxes of the extension made after September 13, 1939, to every factory, mill or plant in the State of Alabama involving an expenditure of not less than \$50,000 in any twelve months period, irrespective of the nature of the industry involved. Such a far reaching exemption should not be inferred from Section 6.

If the second proviso is to be carried beyond the provisions of Section 6, the question arises as to whether the exemption of improvements or extensions is limited to ad valorem taxes for state purposes or includes the county and municipal levies also, and what method is to be used to carry into effect such exemption.

The stated purpose of Section 6, the machinery provided to carry into effect its provisions, and the general rules of construing statutes limit the applicability of the second proviso to the industries enumerated in Section 6.

For this reason the opinion of January 6, 1946, is overruled.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 14, 1947.

Hon. James E. Folsom, Governor,
State of Alabama,
CAPITOL.

Registrars—State Employees.

Title 17, Section 21, Code of Alabama 1940, does not prohibit the appointment of a State employee employed on an hourly basis to the board of registrars of a county.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion bearing date of October 9, 1947, is as follows:

"Would you please give me an opinion on the following question, viz:

"Can a state employee, working on a job by the hour, hold a position on the board of registrars?"

In addition to the information contained in your basic request, you further advised this office to the effect that the employee concerned is a part-time employee of the Alabama Department of State Docks and Terminals, Mobile, Alabama.

It is my opinion that your inquiry should be answered in the affirmative.

Your attention is invited to Title 17, Section 21, Code of Alabama 1940, which reads as follows:

"Section 21. Registrars; appointment of.—Registration shall be conducted in each county by a board of three reputable and suitable persons to be appointed by the governor, auditor, and commissioner of agriculture and industries, or by a majority of them acting as a board of appointment, and who must be also qualified electors and residents of the county and who shall not hold an elective office during their term. One of said members shall be designated by the board of appointment as chairman of the board of registrars for each county. Provided, however, that in counties of over three hundred and fifty thousand population, according to the last or any subsequent federal census, that the governor shall appoint the chairman of the board of registrars."

It will be noted from the above code provision that the employee concerned herein is not disqualified for appointment as a registrar on

the ground of his present employment by the State. He is not holding an elective office.

In my opinion, the provisions of the Constitution of Alabama 1901, Section 280, which prohibit a person from holding two offices of profit at the same time, under this State, are not applicable in the instant case as two offices of profit are not involved. *State ex rel. Glenn v. Wilkin-son*, 220 Ala. 172, 124 So. 211.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 15, 1947.

Hon. Jno. D. Chichester,
Chairman, Board of Commissioners,
Alabama Real Estate Commission,
CAPITOL.

Licenses—Infants—Real estate brokers or salesmen.

1. Minors cannot be licensed as real estate brokers or salesmen unless their disabilities of non-age have been removed in the manner prescribed by Title 27, Sections 13-20, Code of Alabama 1940.

2. Minors whose disabilities of non-age have been removed can be licensed as real estate brokers or salesmen.

3. A married woman or widow, over 18 and under 21 years of age, can be licensed as a real estate broker or saleswoman.

Title 34, Section 76, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request dated August 29, 1947, for an official opinion, is as follows:

"Our Commission would like to have an Attorney General's Opinion as to whether or not any applicant for a real estate license, either as Broker or Salesman could be issued a license if they were under 21 years of age, and whether or not any applicant for a real estate license, if they were under 21 years of age, and had had their disabilities of non-age removed."

The licensing of real estate brokers and salesmen is governed by Title 46, Sections 298-311, Code of Alabama 1940. These sections are a

codification of Act No. 344, General Acts 1927, page 335, approved August 27, 1927, as amended by Act No. 279, General Acts 1931, page 327, approved June 18, 1931.

The license requirements of Title 46, Section 298, Code of Alabama 1940, were designed to regulate the business of real estate brokers and salesmen, and to protect the public against fraud and imposition, and this section requires a license as evidence of their qualifications and fitness. *Marx v. Lining*, 231 Ala. 445, 165 So. 207. It is not merely a revenue license, but is a regulatory license imposed under the police power of the state. *State v. Polakow's Realty Experts, Inc.*, 243 Ala. 441, 10 So. 2d 461; *Knight v. Watson*, 221 Ala. 69, 127 So. 841; Quarterly Report of Attorney General, Vol. 22, page 5. Title 46, Section 309, Code of Alabama 1940, makes operation without a license a penal offense. The contract of an unlicensed salesman is void. *Knight v. Watson*, *supra*.

In most states, except for marriage, a person, whether male or female, is deemed of age at 21; and so where the laws are silent. See *Hutchinson v. Till*, 212 Ala. 64, 101 So. 676. Except for necessities, infants are incompetent to become parties to an express contract; their executory contracts generally are avoidable. *Commercial Credit Co. v. Ward, etc. Auto Co.*, 215 Ala. 35, 109 So. 574; *McCarty-Greene Motor Co. v. McCluney*, 219 Ala. 211, 121 So. 713. Upon arriving at their majority, infants generally may repudiate or avoid contracts made during infancy, and an infant's plea that he was an infant at the time of making the promise sued upon will defeat an action upon his promise. *Bell v. Burkhalter, et al.*, 176 Ala. 62, 57 So. 460, 183 Ala. 527, 62 So. 786; *Eureka Company v. Edwards*, 71 Ala. 248, 46 Am. Rep. 314. Except for necessities, this immunity from liability on their contracts is granted infants as a matter of favor, intended as a shield and compensation for the want of that greater wisdom and prudence which time and experience usually teach.

In certain cases, however, the several circuit courts in equity of this State are authorized to relieve minors over 18 years of age from the disabilities of non-age and to fix their legal status. Title 27, Section 13, Code of Alabama 1940. Upon removal of the disabilities of non-age, the infant thereby is invested with the right to sue and be sued, to contract, to buy, sell and convey real estate, and generally to do and perform all acts which the infant lawfully could do if 21 years of age. Title 27, Section 17, Code of Alabama 1940; *Ketchum v. Faircloth-Segrest Co.*, 155 Ala. 256, 46 So. 476.

Married women, however, stand upon a different ground. A female over 18 years of age is by marriage emancipated, and, hence, a married woman or widow under 21 and over 18 years of age, does not suffer the disabilities of her minority. Title 34, Section 76, Code of Alabama 1940. She may sue or be sued as if sole. Title 34, Section 72, Code of Alabama 1940.

Therefore, whether an applicant under 21 years of age can be issued a real estate broker's or salesman's license depends upon whether the disabilities of non-age have been removed. If the applicant is a male or an unmarried and unwidowed female, such disabilities can be removed only in the statutory manner. If the applicant is a married woman or a widow, and over 18 years of age, her disabilities were removed by the marriage.

In view of the voidability of an infant's executory contracts and the fact that the license requirements, *supra*, were designed as a protection for the public, it is my opinion that the Alabama Real Estate Commission cannot lawfully license a male minor, or an unmarried and un-widowed female minor, unless his or her disabilities of non-age have been removed in the manner prescribed in Title 27, Section 13, Code of Alabama 1940. If he or she has been relieved of the disabilities of non-age, a license may be issued. A married woman or widow over 18 years of age may be licensed, even though a minor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 15, 1947.

Hon. E. L. Roberts,
County, Attorney,
Etowah County,
Gadsden, Alabama.

Counties—Statutes—Condemnation—Prohibited Liquors.

1. Unless otherwise provided, a statute, other than a penal statute, becomes effective on the date of its approval by the Executive.

2. Act No. 126, General Acts 1947, approved July 17, 1947, became effective on July 17, 1947.

3. Act No. 126, General Acts 1947, approved July 17, 1947, requires that counties shall receive part of the proceeds of sale of condemned vehicles transporting prohibited liquor when the sale is made on or after July 17, 1947, the effective date of the amendment.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of September 29, 1947, is as follows:

"I should like to have your official opinion on the following question.

"Act 126 (H.B. 24) approved July 17, 1947, amending Section 251 of Title 29 of the 1940 Code of Alabama, provides that part of the money from the sale of property forfeited to the State shall be paid to the general fund of the County in which the property is seized.

"Will not this Act be applicable in all pending cases in which no decree has yet been rendered?"

In my opinion, your inquiry should be answered in the affirmative.

Title 29, Section 247, Code of Alabama 1940, declares that conveyances and vehicles used for the transportation of prohibited liquors shall be contraband and shall be forfeited to the State of Alabama. The prosecuting officer of the county is required to condemn such vehicles or conveyances by filing a petition in equity in the circuit court. Title 29, Section 248, Code of Alabama 1940. The decree of the circuit court in such proceedings would naturally be that the property be forfeited to the State of Alabama and that such property be sold.

Title 29, Section 251, Code of Alabama 1940, provides for the distribution of the proceeds of the sale of such property. Before amendment, this statute provided as follows:

"§ 251. Proceeds of sale of contraband or forfeited property; distribution and disposition of funds.—The proceeds of the sale of any such property forfeited to the state, whether sold by court decree or by an officer under advertisement, shall, after paying all expenses in the cause, and of advertisement, as the case may be, including the costs of seizure and of keeping the property pending the proceedings shall be applied as follows: One-fourth to the officer making the seizure and furnishing the proof, but if proof be furnished by another person than the officer making the seizure, one-eighth of the proceeds shall go to the furnisher of the proof and one-eighth to the officer making the seizure and assisting in the condemnation case, or who makes the sale under advertisement. The remainder of the proceeds shall be paid into the treasury of the state as a law enforcement fund to be used and applied for the enforcement of state laws under the supervision and control of the governor, same to be paid out on warrant of the comptroller on a bill against the state approved by the attorney-general and governor."

This Code section was amended by Act No. 126, General Acts 1947, approved July 17, 1947. As amended, this section provides as follows:

"The proceeds of the sale of any property forfeited to the State, whether sold by court decree or by an officer under advertisement,

shall, after paying all expenses in the cause, and of advertisement, as the case may be, including the costs of seizure and of keeping the property pending the proceedings, be applied as follows: one-fourth of the amount shall be paid to the officer making the seizure and furnishing the proof, but, if proof be furnished by a person other than the officer making the seizure, one-eighth of the proceeds shall go to the furnisher of the proof and one-eighth shall go to the officer making the seizure and assisting in the condemnation case or who makes the sale under advertisement; one-half shall be paid into the general fund of the county in which the property is seized; and one-fourth shall be paid into the treasury of the State as a law enforcement fund to be used and applied for the enforcement of State laws under the supervision and control of the Governor."

There is no provision in the amendment specifying the effective date thereof, and such being the case, the statute takes effect from the time of its approval or otherwise becoming a law, as it is not a penal statute. *Rathbone v. Bradford*, 1 Ala. 312. A statute, other than a penal statute, goes into effect upon its approval by the Executive, unless it is otherwise provided therein. *Montgomery Traction Company v. Knabe*, 158 Ala. 458, 48 So. 501; *State v. Stearns*, 200 Ala. 405, 76 So. 321.

There being no special provision in the amendment to Title 29, Section 251, Code of Alabama 1940, such act went into effect upon the day it was approved by the Executive, July 17, 1947. When sales are made on and after that day, the county is entitled to its portion of the proceeds of the sales of such condemned property as provided for in the amendment, *supra*. Therefore, if there were pending cases on that day where decrees had not been rendered, when decrees are rendered the county will be entitled to its designated share of the proceeds of sale as provided for in the amendment.

To go further, it is my opinion that the date of sale governs the distribution of the proceeds thereof. Any distribution of the proceeds of the sale of condemned vehicles, when the sale is made on or after July 17, 1947, should be made under the provisions of the amendment, even though the decree was rendered prior to that time.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 15, 1947.

Hon. Frank A. Boswell, Director,
Department of Corrections and Institutions,
CAPITOL.

Costs and Fees—Probation—Corrections and Institutions.

When a defendant is convicted for a violation of Act No. 389,

General Acts 1945, page 607, approved July 7, 1945, and placed on probation, Department of Corrections and Institutions not authorized to pay the \$50.00 reward provided in said Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion bearing date of July 31, 1947, is as follows:

"Can the Department of Corrections pay legally a reward of \$50.00 to the officer furnishing evidence in the conviction of a person found guilty of stealing a cow (See Act #389 atth) when the person has been granted probation.

"For your ready reference I am attaching copy of the Act, Probation transcript and certificate of the presiding judge.

"I can not find where the law covering has been changed any since created, and that during the last administration the Director of the department instructed that the department only pay such reward when the person found guilty of this charge be incarcerated in prison.

"Would appreciate your opinion on above as early as possible with the return of enclosed papers."

In my opinion, your question should be answered in the negative. From the facts stated in your letter of inquiry and enclosures therein, it is evident that the defendant's sentence has been suspended and he has been placed on probation for five years. The only time that the Department of Corrections and Institutions could pay the \$50.00 reward is when the defendant is incarcerated in the penitentiary.

Section 1 of Act No. 389, S. 122, General Acts 1945, page 607, approved July 7, 1945, provides in part as follows:

"* * * * * Should the person convicted be incarcerated in a State prison, the \$50.00 cost hereinabove provided for shall be subject to payment in the manner in which other costs may be paid according to Section 69 of Title 45 of the 1940 Code of Alabama."

I refer you to the following opinion of this office relative to payment of costs by the Department of Corrections and Institutions in probation cases: Quarterly Report of Attorney General, Vol. 24, page 78.

I am returning herewith the enclosures to your letter of inquiry.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 15, 1947.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Counties—Courts of County Commissioners—Rights-of-way.

County gasoline tax funds may be spent for keeping open a ditch on property owned by the grantor in a deed conveying a right-of-way to the county for the purpose of constructing a public road, when the county governing body agreed, as a part of the consideration for the execution of such deed, to keep the ditch open, even though such agreement was not set out in the deed.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of September 19, 1947, is as follows:

"Please give me a legal opinion as to whether or not Houston County, Alabama, can legally perform work on a ditch located on private property opposite a state highway under the following statement of facts.

"In 1928 Houston County, Alabama, obtained a right-of-way in order to build a state highway between Dothan and Ashford, Alabama; and in obtaining the right of way at Cowarts, Alabama, from one Mr. Forrester the County agreed to keep open a ditch on the land of Mr. Forrester which is opposite the state highway. This was a part of the consideration for Mr. Forrester executing said deed to said highway. This consideration was not set out in the deed executed by Mr. Forrester, but it was noted by the Board of Revenue of this County.

"I would like to have a legal opinion as to whether or not this County can legally expend money out of the gasoline fund of this county to keep the ditch open on the private property of Mr. Forrester in Cowarts, Alabama, in order that the water that comes off the said highway may be taken care of to save the land of Mr. Forrester from washing away. This county is morally responsible to do that work; but before the county spends any of the gasoline fund in doing the work, I wanted the opinion as to the legality of said work from your office."

It was held by this office in an opinion found in Quarterly Report of Attorney General, Vol. 2, page 82, that county gasoline tax funds could legally be used for the purpose of purchasing rights-of-way for a public road. It has also been held that the expenses of condemnation and

attorneys' fees for bringing condemnation proceedings and acquiring rights-of-way for public roads may be paid out of the county gasoline tax funds. Biennial Report of Attorney General, 1936-38, page 489.

In the case under consideration, it is my conclusion that the agreement on the part of the governing body of Houston County to keep a ditch open on private property of the grantor in a deed conveying a right-of-way to the county was part of the cost of securing the right-of-way. The fact that the agreement to keep the ditch open was not set out in the deed as part of the consideration would not relieve the county from its obligation to keep the ditch open.

In view of the holding of the above opinions and the conclusion that the agreement to keep the ditch open was part of the cost of securing the right-of-way, it is my opinion that gasoline tax funds of the county may be legally spent in keeping the ditch open.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 16, 1947.

Hon. Ward W. McFarland, Director,
State Highway Department,
Montgomery 4, Alabama.

Trailers—Highways.

Act No. 690, General Acts 1947, (Ms) approved October 9, 1947, amends Title 36, Section 80, Code of Alabama 1940, so as to make lawful operation of full trailers on state highways for the purpose of constructing highways or other facilities of the State or a political subdivision thereof.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request dated April 21, 1947, for an official opinion is as follows:

"The Highway Department finds from time to time that a certain part of the Alabama Law, relating to operation and registration of motor vehicles, being Title 36 of the Code of 1940, prevents the using of certain modern construction equipment that is necessary on many of its jobs. Specifically, we have reference to what is commonly called 'a full trailer.' Under Paragraph (h) of Section 1 of Title 36, a trailer is defined as follows:

"'Trailer' means any vehicle designed to be drawn by a motor truck or truck-tractor, but supported wholly upon its own wheels,

an intended for the carriage of freight or merchandise and with a load capacity of over one thousand pounds.

"It is our contention and belief that this does not include a trailer that is used on construction jobs for hauling earth, sand, or gravel and other materials from one part of a job to another. We further believe that certainly it was not the intention of the Legislature when it used the word freight or merchandise in Section 80 of the above mentioned Law, to prevent the use of the trailer for construction purposes. The word freight or merchandise is specifically intended to mean just what we all know it does mean.

"This request is in no way intended to seek any ruling from your office that would open the highway for the use of trailers, but to make it legal to use them as outlined herein, by us or contractors in actually moving material on the job.

"We, therefore, hope that after you have made a study of Title 36 aforementioned, and especially Paragraph H thereof, you can arrive at an opinion that will make it legal for such trailers to be used as outlined above. For the Law to remain as it would cause an excessive cost for dirt and other material moving in many instances, and place us in a position where we could not take advantage of modern equipment."

Since the date of your request, Title 36, Section 80, Code of Alabama 1940, has been amended by Act No. 690, General Acts (1947), (Ms) approved October 9, 1947, to read as follows:

"No person shall operate any trailer as defined in this title on any highway unless such trailer is operated for the purpose of constructing highways or other facilities of the State or a political subdivision thereof. The Highway Department is authorized to regulate the movement of such trailers from one job to another by special permits issued in the same manner as permits are issued under Section 91 of this Title. No trailer or semi-trailer of any kind shall be used for the hauling of passengers for hire except as provided by Article 2 of this Chapter."

This section, as amended, is clear and unambiguous. The indecision and uncertainty raised in your request for an opinion have been removed by the passage of Act No. 690, supra, which admits of no construction. It, therefore, is my opinion that this Act makes legal the operation on the highways of this State of full 4-wheeled trailers for the purpose of constructing highways or other facilities of the State or a political subdivision thereof.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 17, 1947.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Attorneys—Funds—State—Counties.

Attorney's fee provided for in Act No. 176, General Acts 1947 (Ms), approved July 23, 1947, payable out of general fund of the State, and not out of county funds, in case commenced prior to effective date of said act but not concluded until thereafter.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of October 10, 1947, is as follows:

"On November 9, 1946, Judge D. C. Halstead, Judge of the 20th Judicial Circuit, appointed Hon. R. Clayton Wiggins, a practicing attorney, to defend Jackson Calloway on a charge of first degree murder in Houston County, Alabama.

"On October 1, 1947, the murder charge against Jackson Calloway was concluded; and the last order was made on that date in the case. On October 9, 1947, Judge Halstead, in the above case, made an order to Houston County, Alabama, to pay for the services of R. Clayton Wiggins in the defense of Jackson Calloway in the sum of \$75.00.

"I understand that an act of legislature was approved on July 23, 1947, by the Governor of Alabama making the services of an attorney for indigent defendants who were indicted for capital offenses to be paid out of the general funds of the treasurer of the State of Alabama instead of the county in which the crime was committed.

"Please render an opinion, if the above charge of \$75.00 should be paid by the County of Houston or the State of Alabama."

In answer to your inquiry, it is my opinion that the above charge of \$75.00 should be paid by the State of Alabama out of its general fund and not out of county funds.

Act No. 176, General Acts 1947 (Ms), approved July 23, 1947, provides as follows:

"To Amend Section 318, Title 15, of the 1940 Code of Alabama, as Amended by Act No. 251, General Acts of 1943, Approved June 24, 1943.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. That Section 318, Title 15 of the 1940 Code of Alabama, as amended by Act No. 251, General Acts of 1943, approved June 24, 1943, be and the same is hereby amended to read as follows: 'Section 318. When any person indicted for a capital offense is without counsel and the trial judge, after due investigation, is satisfied that the defendant is unable to employ counsel, the court must appoint counsel for him not exceeding two, who must be allowed access to him, if confined, at all reasonable hours, and as compensation for said defense the attorney or attorneys so appointed shall be entitled in each case to a fee fixed by the judge presiding at said trial, which fee shall be not less than fifty (\$50.00) dollars, nor more than one hundred (\$100.00) dollars, to be paid on the warrant of the State Comptroller from the general funds in the State Treasury. Said presiding judge in the case shall certify to the Comptroller that "The attorney or attorneys appointed by the court in the case of Alabama vs. . . . (name of defendant) has (or, have) performed the service required of him (or them) in representing the said defendant and that the fee therefor has been fixed in the sum of dollars (designate amount of fee)." Whereupon a warrant shall be drawn in favor of the attorney or attorneys upon the general funds of the Treasury of the State of Alabama in payment therefor.'

The effect of the 1947 Act was to provide for the payment of the attorney's fee thereunder out of the general fund of the State instead of out of the general fund of the county under the 1943 Act. The effective date of the 1947 Act was July 23, 1947.

The question presents itself as to when the attorney's fee in question accrued. If same accrued prior to the effective date of the 1947 Act, it is payable out of the general fund of the county under the 1943 Act. On the other hand, if said fee accrued on or subsequent to July 23, 1947, it would properly be payable out of the general fund of the State. 7 C. J. S., 1105, Attorney and Client, Section 199, reads in part as follows:

" * * * * An attorney's right of action for compensation, generally, accrues at the time the services contemplated by his contract of employment have been substantially performed, or, where the compensation is to be paid on a certain contingency, on the happening of the contingency. If the attorney acts under a general retainer, the contract is generally considered an entire one, and the right of action for compensation does not arise until the proceedings have been brought to some conclusion, and the relation of attorney and client has been terminated, or, where it is stipulated that the attor-

ney shall collect the judgment, until the collection has been made.
* * * * *

In view of the above, it is my opinion that the attorney's fee in question accrued upon the conclusion of the case under consideration, which was October 1, 1947. Therefore, the same is properly payable by the State of Alabama out of its general fund, and not out of county funds, as same accrued subsequent to the effective date of the 1947 Act, supra.—Cf. Quarterly Report of Attorney General, Vol. 43, page 26.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 17, 1947.

Hon. Roy E. Blair,
Tax Assessor,
Madison County,
Huntsville, Alabama.

Counties—Madison County—Tax Assessors—Assessments.

1. It is not necessary for the tax assessor of Madison County to keep an alphabetical file of the original assessment sheets according to beats, if the county governing body of the county has by proper order relieved him from visiting each voting place in each precinct for the purpose of listing property for taxation, under the authority of Title 51, Section 38, Code of Alabama 1940.

2. In such event, the tax assessor of Madison County may legally keep an alphabetical file of the original assessment sheets for the county as a whole.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of August 27, 1947, is as follows:

"I was advised upon my recent appointment as Madison County Tax Assessor that tax returns must be filed alphabetically by Beats and inasmuch as I do not have to visit any of the precincts or beats, I am wondering if it is permissible to file, or list, all tax returns in our county under one alphabet, i.e., John Jones is listed as residing in Beat 1, and under the proposed alphabetical setup, Johnson Jones, residing in Beat 2, would follow John Jones of Beat 1.

"I am also wondering if it is necessary to continue listing Beat numbers if all the county is filed alphabetically under one heading?"

"It is my understanding that the previous Tax Assessor asked you for a ruling as to consolidating several school districts into three, IN city, OUT of City, and MADISON (inc. town). At present there are 15 school districts in our County, and the school tax is broken down into 15 districts, however, money paid to the schools by the County Board of Education is quite often transferred from one district to another, wherever it is needed most. Will it take a special election, a ruling by you, or an act by the Board of Revenue to allow consolidation?"

My answer to your first question is in the affirmative.

Title 51, Section 38, Code of Alabama 1940, provides that in those counties having a population of one hundred thousand or less (of which Madison County is one) the tax assessor must visit each voting place in each precinct for the purpose of listing property for taxation.

This section further provides that the court of county commissioners or other like governing body of the county may by proper order relieve the tax assessor from making such visits, when in its opinion such order is advisable.

If the county governing body of Madison County, under the authority of Section 38, *supra*, has relieved the tax assessor of the duty of visiting each voting place in each precinct for the purpose of listing property for taxation, then you are not required to make such visits.

It can readily be seen that, where the tax assessor is required to visit each voting place in each precinct in the county for the purpose of listing property for taxation, the original assessment sheets should be kept in alphabetical order according to beats. This for the reason that upon visiting each voting place in each precinct he should have readily accessible the original assessment sheets for that particular precinct. However, where the tax assessor is not required to visit each voting place in each precinct in the county for the purpose of returning property for taxation, I see no reason or logic why the original assessment sheets should be kept on file in his office in alphabetical order according to beats. So to do would serve no purpose whatsoever and it appears to me that in certain instances such a practice might lead to confusion.

You are, therefore, advised that if the county governing body of your county, acting pursuant to Section 38, *supra*, has by proper order relieved you from visiting each voting place in each precinct for the purpose of listing property for taxation, you may legally file the original assessment sheets returned to your office in alphabetical order for the county as a whole and discontinue the filing of such returns by separate beats.

However, your attention is called to the fact that if the above procedure is adopted by you, it will still be necessary to continue listing beat numbers on all assessments filed in your office. This for the reason that at a later date, if it becomes necessary to sell any of the property in your county for the nonpayment of taxes, such tax sales, under the existing statutes, will have to be advertised by beats, and it will, therefore, be necessary for you to continue to show the beat number for every piece of property assessed in your office.

Your second question has heretofore been answered in an opinion rendered to you under date of September 17, 1947.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 17, 1947.

Hon. F. B. Pratt, Superintendent,
County Board of Education,
Bibb County,
Centreville, Alabama.

Counties—Courts of County Commissioners—County Superintendent of Education—Electric Fans.

1. Courts of County Commissioners have authority to purchase and install electric fans for offices in county court houses, whether they become permanent fixtures or not.

2. Biennial Report of Attorney General, 1928-30, page 981, Biennial Report of Attorney General, 1930-32, page 983, and Quarterly Report of Attorney General, Vol. 16, page 177, overruled.

3 Quarterly Report of Attorney General, Vol. 20, page 64, modified.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated August 8, 1947, is as follows:

"I should like you to render a decision as to whether it would be legal for the Commissioners Court of this County to pay for electric fans for the offices of the Superintendent of Education of Bibb County, Alabama."

Courts of county commissioners, boards of revenue or like governing bodies are courts of strictly limited jurisdiction and can exercise only such powers as are conferred upon them by statute. They derive their powers and authority generally from Title 12, Section 12, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560.

Former opinions of this office deny the authority to purchase electric fans upon the assumption that a court of county commissioners may not expend money for any purpose unless express or implied authority is given by statute. These opinions have held that the purchase of electric fans is unauthorized: Biennial Report of Attorney General 1928-30, page 981; Biennial Report of Attorney General 1930-32, page 983; Quarterly Report of Attorney General, Vol. 16, page 177.

However, in Quarterly Report of Attorney General, Vol. 20, page 64, it was held that the county governing body may purchase and install heating, cooling and ventilation systems for county court houses provided such units are permanently affixed to and become a part of the building. This conclusion was based on the authority given county governing bodies in Sections 210 and 212, Code of Alabama 1923, which appear as Title 12, Section 178 and 185, respectively, Code of Alabama 1940.

Title 52, Section 130, Code of Alabama 1940 in part provides:

“ The County board of revenue or court of county commissioners shall also provide necessary furniture, office equipment, stationery, postage, forms, and supplies required by the county superintendent of education and his assistants.” (Emphasis supplied).

In seeking to determine the authority of the county governing body to furnish portable electric fans for the office of the superintendent of education, we, therefore, need only look to the meaning of “office equipment” as used in Title 52, Section 130, *supra*.

Webster defines an “office” as “the place where a particular kind of business or service for others is transacted, especially the building, room or department in which the clerical work of an establishment is done.” “To equip” means “to furnish for service” and “equipment” refers to articles comprised in an outfit, as furnishings or apparatus. Webster's Collegiate Dictionary (5th edition—1942).

I, therefore, construe the term “office equipment” to mean those furnishings and accessories necessary and desirable to furnish an office for service. It is my opinion that electric fans fall within this category. It will be noted from Title 52, Section 130, *supra*, that the county governing body is charged with the responsibility of furnishing the superintendent of education and his assistants with office quarters which are “ample, convenient, and comfortable.” It, therefore, follows that the county governing body, under the terms of Title 52, Section 130, *supra*, has authority to equip the offices of the superintendent of education with electric fans.

Previous opinions to the contrary, *supra*, are hereby expressly overruled and withdrawn. The holding of the opinion reported in Quarterly Report of the Attorney General, Vol. 20, page 64, *supra*, is adhered to, but the opinion is hereby modified to the extent that heating, cooling and ventilating systems need not necessarily be affixed to and become a part of the building. It follows that all offices of the court house may be equipped with electric fans whether the same become permanent fixtures or not.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 17, 1947.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
CAPITOL.

Agriculture and Industries—Livestock.

1. The responsibility of determining the approved immunizing agents for hog cholera to be distributed free by the State under Act No. 370, General Acts 1947 (Ms.), approved August 16, 1947, falls upon the Department of Agriculture and Industries.

2. It is the duty of the Department of Agriculture and Industries to determine what swine come under the category of "weening pigs" and "grown hogs" as used in the act.

3. The act provides that the cost of administering such immunizing agents shall fall upon the owner of the swine, and consequently employees of the State Livestock Sanitary Division who are on a full time salary may not administer such immunizing agents during the hours of their employment by the State.

4. Such immunizing agents must be distributed by the Department of Agriculture and Industries through the persons designated in the act and may not be distributed directly to the farmers.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of September 4, 1947, is as follows:

"I request your opinion in the following matters with reference to the recently enacted Act No. 370, which has to do with the distribution of anti-hog serum:

"1. Does the State Veterinarian have discretionary power to say whether serum and virus shall be used or whether he can supply other approved immunizing agents in place of serum and virus when in the opinion of the State Veterinarian other immunizing agents would be safer to use.

"2. Does the State Veterinarian have the power to designate what a weening pig is. (My interpretation of the last sentence in Section 2 would be pigs 6 to 10 weeks of age or pigs weighing 40 pounds or less.)

"3. What should be considered a grown hog as mentioned in Section 8½. (My interpretation would be a hog of breeding age.)

"4. In the event an employee of the State Livestock Sanitary Division who is on full time salary should vaccinate hogs with free serum or other agents would he be authorized to collect a fee for administering the product. In the event he was authorized to collect from the farmer would this fee have to be turned in to the serum fund or could said employee retain the fee for his personal use.

"5. Does the Bill prohibit the shipment of free immunizing agents including serum and virus directly to farmers. (My interpretation is that the officially designated administrator is the only person to whom these products can be shipped.)"

It is my opinion that your first inquiry should be answered in the negative. It appears to me that Section 1 of the act is very clear wherein it states: "The Department of Agriculture and Industries is hereby authorized and required to purchase anti-hog cholera serum, hog cholera virus and/or any other approved immunizing agent in such units as deemed advisable by said department. * * * *". This section places the responsibility of determining the type of approved immunizing agents to be used directly upon the Department of Agriculture and Industries and not upon the State Veterinarian. However, in making this determination, the Department may accept the recommendation of the State Veterinarian if it so desires.

Your second question must also be answered in the negative. I am of the opinion that the duty of determining what swine come under the category of "weening pigs" and "grown hogs" (referred to in your third question) rests upon the Department of Agriculture and Industries, and so long as the decisions made by it are reasonable and not arbitrary or capricious, the same should be final. Certainly, it would be appropriate for the Department to obtain the opinion of the State Veterinarian, its expert in such matters, before making its determination. I, a mere layman in such matters, express no opinion on the interpretations given in your request for an opinion.

In answer to your fourth question, I call your attention to the last sentence of Section 5 of said act, which reads: "The cost of innoculating

shall fall on the owner." If it were intended that employees of the State Livestock Sanitary Division who are on a full time salary should administer these immunizing agents, then it appears that the Legislature would have specifically provide the fee to be charged by such employees for such service and the disposition of the same. However, it did not do so. Consequently, I am of the opinion that such employees may not administer such immunizing agents during the hours of their employment by the State.

In my opinion, your fifth question should be answered in the affirmative, as Sections 2 and 4 of the act enumerate the persons through (by means of) which the Department of Agriculture and Industries shall distribute the subject serum, virus and/or other approved immunizing agents.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 20, 1947.

Hon. Roy Johnson,
Tax Assessor,
Jefferson County,
106 Courthouse,
Birmingham 3, Alabama.

Taxation—Exemptions—Corporations.

The property of the Club House of the Third District of A. F. W. C., Inc. is exempt from ad valorem taxation under the provisions of Title 51, Section 2(d), Code of Alabama 1940.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of September 24, 1947, is as follows:

"On May 21, 1947, this office requested your opinion regarding certain property that was in the process of being purchased by the Third District of the Alabama Federation of Women's Clubs, Inc. At the time of the request, the writer set out certain portions of their charter granted in July 1924, together with the use that would be made of the property after the club acquired the same. On August 7, 1947, you rendered an official opinion to this office to the effect that the property owned by this organization would not be exempted from ad valorem taxes under the present laws of this state.

"Since the original request for an opinion was made, a 'Declaration of Incorporation for the Club House of the Third District of the A. F. W. C., Inc.' has been filed in Jefferson County in the office of the Probate Judge, and recorded on July 16, 1947. Enclosed you will find a photostatic copy of this declaration, which sets out the aims and purposes of this organization, as well as the purposes for which their property will be used. This organization has recently purchased a parcel of property in the City of Birmingham, which is now being equipped to be used as a club house as set out, and for the purposes as stated in our letter of May 21.

"This organization has requested that this office submit to you a copy of the new charter with a request that you review their purposes, etc. as set out in the charter, and issue a new opinion in the event that the facts may change your opinion of August 7, 1947.

"Please return to us the photostatic copy of the A. F. W. C. Declaration of Incorporation when you have finished using it."

It is my opinion that the property of the Club House of the Third District of A. F. W. C., Inc., is exempt from ad valorem taxation under the provisions of Title 51, Section 2(d), Code of Alabama 1940, which reads as follows:

"Sec. 2. Persons and property.—The following property and persons shall be exempt from ad valorem taxation and none other: * * * *
(d) All the property of literary and scientific institutions and literary societies, when employed or used in the regular business of such institution."

I quote from the Declaration of Incorporation of the club as follows:

"WHEREAS, the undersigned desire to incorporate under the laws of the State of Alabama for the purpose of acquiring, buying, building or holding real estate and club house or club houses with such personal property as may be necessary, convenient or incident to the operation or management of such properties to be used for the purposes herein stated and exclusively for purposes purely charitable or social and educational and not for financial profit; and for social, intellectual, educational and benevolent purposes; and for promoting knowledge, promoting arts, promoting sciences and for the social or literary advancement of the various federated clubs of the said Third District and their members; and for the promotion of the general purposes of the Alabama Federation of Women's Clubs, collectively and separately; to this end and for such purposes, we, the undersigned desire to incorporate and we hereby declare as follows: * * * *

* * * * *

"2. The object and purpose of this corporation is and shall be generally as hereinabove set out; and for benevolent, social, educational and literary advancement of the membership of the Alabama Federation of Women's Clubs, and particularly of the clubs of the Third District of the A. F. W. C., and the members thereof, and not for financial profit; but said corporation shall not be denied the right of charging fees or dues or costs or making service charges, which shall be used for the purpose of operation and maintenance of said corporation property or club house and generally for the purposes hereinabove set out. (Emphasis supplied.)

* * * * *

"6. This corporation will not issue any shares of stock and is not formed for pecuniary purposes."

The word "literary" has no technical legal meaning, but should be given its ordinary and usual meaning. *New England Theosophical Corporation v. the City of Boston*, 51 NE 456; *The Common Council of Indianapolis and Another v. McLean*, 8 Ind. 328.

In Webster's New International Dictionary at page 1442, the word "literary" is defined as follows:

"Of or pertaining to letters or literature; pertaining to learning especially as transmitted by books and writings, or learned men; as literary fame; a literary history; literary conversation."

In my opinion, the word "literary" denotes mental improvement and culture. I am not unmindful of the general rule that exemptions from taxation are strictly construed in favor of the taxing power and against the taxpayer. *Bowman v. State Tax Commission*, 235 Ala. 190, 196 So. 216. However, after examining the objects and purposes of this corporation, it is my opinion that the corporation is an incorporated literary society, and its property is exempt from ad valorem taxation.

The photostatic copy of the declaration of incorporation is returned herewith.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

October 20, 1947.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Water and Water Ways—

1. A person fishing within the public waters of the State, as defined by Title 8, Section 68, Code of Alabama 1940, as amended, is not guilty of the offense of fishing without permit in or upon the waters of another; nor is such person guilty of a trespass unless he enters upon the lands of another adjacent to such waters for the purpose of fishing.

2. Whether a body of water is part of a natural watercourse is a question of fact to be determined from the circumstances associated therewith.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of May 6, 1947, is as follows:

“Please advise me whether or not a person would be held to be violating the law as a trespasser or fishing without a permit on land not his own where that person entered the river at some other point and then on account of high water or back water, as you might say, went in his boat a good distance from the river and what would be called the normal water and fished over and across lands belonging to another person. In other words, we have a problem before us where a party entered the river at one point, drifted on down the river, then out in the back water and fished over lands belonging to another party and the evidence shows that the party in question was something like one-half or three-fourths of a mile from the normal stage of the river water. I have read Section 68 and 69 of Title 8 with reference to the fishing laws but prefer your opinion on the subject.”

The question presented by your inquiry is, in my opinion, a mixed question of law and fact.

Title 8, Section 68, Code of Alabama 1940, as amended by Act No. 553, General Acts 1943, page 541, defines those waters of the State to be known as public waters and those waters to be known as private waters. The provisions of such statute are as follows:

“All waters of this state are hereby declared to be public waters if such waters be natural bodies of water such as rivers, creeks, brooks,

lakes, bayous, bays, channels, canals or lagoons or be dug, dredged, or blasted canals and if these waters traverse, bound, flow upon or through, or touch lands title to which is held by more than one person, firm, or corporation. Any water impounded by the construction of any lock or dam or other impounding device placed across the channel of a navigable stream is declared a public water. All waters caused to be impounded or owned or leased by an municipality, county, or other governmental unit are also declared to be public waters; likewise all impoundments owned or operated by public utilities when such impoundments touch or bound lands title to which is held by more than one person, firm, or corporation are declared to be public waters, provided that before any person may go or be upon the posted lands of another for the purpose of fishing he or she shall procure the consent of the landowner or his agent. Private waters are defined as any body of water wholly on lands held in fee or in trust, or under lease by any one person, firm, corporation, or club and include impoundments that are wholly on lands held in fee or in trust, or under lease by any one person, firm, corporation, or club, and regardless of the extent of the impounded stream, provided such stream is non-navigable."

Title 8, Section 69, Code of Alabama 1940, defines the offense of fishing without permit in or upon the waters of another and of trespassing upon the lands of another for the purpose of fishing, declares each of such offenses to be a misdemeanor, and provides a penalty therefor. The provisions of this statute are as follows:

"Any one who shall take, catch or kill, or in any way aid in the taking, catching, or killing of any fish in any pond, pool, lake, or other reservoir, or body of water wholly on the premises of another person, or go or be upon or trespass on the lands adjacent to such pond, pool, lake, or body of water for the purpose of catching or taking fish therefrom in any manner, or by any means whatsoever, without a written permit from the owner of such premises or body of water (such permit when given to remain in force and effective for twenty-four hours, and no longer, unless otherwise specified in the permit itself, in which event the time, and also the terms of such permit to govern absolutely, unless revoked in writing by the party issuing the same and served in person on the party or parties so affected) shall be guilty of a misdemeanor, and, on conviction, may be fined not more than fifty dollars, but if the conviction be for seining, shooting, or dynamiting for fish, the fine shall not be for less than twenty-five dollars, to be paid in lawful money of the United States, and the defendant may also be sentenced to hard labor for the county for not more than ninety days, at the discretion of the court."

Your inquire as to whether one entering a navigable stream and subsequently drifting down such stream onto flood waters covering the lands of another would be guilty of a trespass or of fishing without permit

as against the owner of the flooded land. The answer to such question is, in my judgment, dependent upon certain facts concerning the waters upon which such person is boating or fishing, which I shall herewith attempt to define and point out.

If the waters upon which such person is fishing constitutes part of a natural watercourse, then, in my opinion, such person is guilty of no offense. The statutes above set out are directed toward and define as offenses the acts of fishing without permit upon waters wholly upon the lands or premises of another or of trespassing upon the lands of another adjacent to such waters for the purpose of fishing, and do not declare it to be an offense for one to fish upon the waters of a natural watercourse, or public waters of the state, even though such waters do touch upon or border the lands of another. It is, therefore, my opinion that your inquiry devolves into a question of fact as to whether the waters upon which such person was fishing were, in fact, a part of a natural watercourse or whether such waters were merely surface waters located upon the lands of another. I find no Alabama cases dealing with such question.

In 67 C. J., Waters, Section 3, the following definition of a natural watercourse is found:

"While it has been said that no definition of a natural watercourse can be given that will apply to all cases, in general a natural watercourse is one made by the natural flow of the water caused by the general superficies of the surrounding land from which the water is collected into one channel. * * * *

Likewise, within Vol. 67, C. J., Waters, Section 286, in defining what constitutes surface waters, the following statement is found:

"* * * * Over flow or flood waters of a river, stream, or natural watercourse become surface waters when they leave the main current never to return and spread out over lower ground; but if they form a continuous body with the water flowing in the ordinary channel, the current widening to the full width of the water, or if they depart from the stream presently to return or to run into another stream or lake, it has been held that they are to be regarded as a part of the stream and not as surface waters, * * * *

I discover that it has been held by the courts of certain of the other states that where a stream of water has a low water channel and a flood channel, and in times of flood the waters of both channels flow in one uniform and continuous current, all the waters are the waters of a natural watercourse. *Miller & Lux v. Madera Canal & Irrigation Co.*, 99 P. 502, 155 Cal. 59; *Zollman v. Baltimore & O. S. W. R. Co.*, 121 N.E. 135, 70 Ind. App. 395.

Also that a "watercourse" includes the overflow waters of a stream which extend beyond its banks in times of ordinary floods, and which at

such times are accustomed to flow down over the adjacent low lands in a broader, but still definable, stream or flow in natural depressions, continuing in a general course, although with definable banks, back into the stream from whence they started, or into another watercourse. *Morgan v. Morgan*, 266 S. W. 35, 205 Ky. 545; *Byrne v. Minneapolis ETC. R. Co.*, 36 N. W. 339, 38 Minn. 212.

It is, therefore, my opinion that the answer to your question must be determined from the facts and circumstances surrounding the body or stream of water here concerned. It is my opinion that if such water does constitute part of a natural watercourse as defined herein, the fisherman is guilty of no offense against the landowner. If, however, such water does not constitute part of a natural watercourse but is mere surface water, not a part of the stream, which is located solely upon the lands of another, such fisherman would be guilty of an offense under the statutes of the State herein quoted.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 20, 1947.

Hon. H. M. Brittain,
Judge of Probate,
Randolph County,
Wedowee, Alabama.

Sheriffs—Mileage—Fees.

1. Chief Deputy Sheriff of Randolph County is entitled to mileage under Act No. 170, Local Acts 1947, (Ms.) approved July 22, 1947, and also when he appears as a witness.

2. He is not entitled to mileage under the act and for appearing as a witness for the same traveling.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion bearing date of September 9, 1947, is as follows:

"Please give me an opinion at your earliest possible moment covering the following situation: 'There has just been passed a local bill by George of Randolph County authorizing mileage for the Chief Deputy Sheriff of Randolph County of 5¢ per mile travel but in no month more than \$75.00 per month. This same Deputy Sheriff will turn in witness certificates claiming mileage travel in each

particular case where he is a witness. What disposition should be made of the mileage claimed by the Chief Deputy Sheriff as a witness who at the same time has been paid 5¢ per mile by the county for travel up to 1500 miles and which said travel mileage as a witness has already been paid by the county?"

"This bill goes into effect October 1, 1947 and for this reason I am anxious to have your opinion by that time if possible."

In answer to your question, it is my opinion that the Chief Deputy Sheriff of Randolph County is entitled to mileage at the rate of five cents per mile in the event he furnishes his own automobile for traveling in the performance of his official duties. This allowance cannot exceed seventy-five dollars for any month and is really allowed the deputy in lieu of furnishing him an automobile for the performance of his official duties.

Section 1 of Act No. 170, Local Acts 1947 (Ms.), approved July 22, 1947, provides as follows:

"Section 1. In the event the Chief Deputy Sheriff of Randolph County furnishes his own automobile for traveling in the performance of his official duties, he shall receive from the county mileage at the rate of five cents for each mile traveled; but mileage shall not be allowed in excess of seventy-five dollars for any month. The mileage allowance shall be in addition to the annual salary of the Chief Deputy Sheriff, which shall be fixed by the governing body of the County at not less than one thousand eight hundred dollars nor more than two thousand four hundred dollars, payable in equal monthly installments by the county."

The Chief Deputy may also be allowed mileage when he has to appear in Court as a witness just as any other person who appears as a witness is allowed his mileage to and from the courthouse. The mileage under the Act, *supra*, and the mileage as a witness should not be considered together as they are altogether different and arise from the performance of separate and distinct services. The Chief Deputy is limited as to the mileage he may receive under the Act, but there is no limitation on the amount of mileage that he might be entitled to as a witness.

This office has held that deputy sheriffs, who are summoned as witnesses, are entitled to their per diem and mileage since appearing as a witness is an individual matter and is not an official duty. Quarterly Report of Attorney General, Vol. 3, page 35.

Of course, the Chief Deputy is not entitled to mileage under the Act for riding to and from the courthouse when he appears as a witness as this would be his personal business and would not be using his private car in the performance of his official duties. He cannot collect mileage under the Act and for appearing as a witness for the same traveling.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 20, 1947.

Hon. Ira C. Ballard,
Sheriff, Etowah County,
Gadsden, Alabama.

Seizure fees—Sheriffs—Etowah County.

Under the provisions of Act No. 318, Local Acts 1947 (Ms.), approved August 15, 1947, the Sheriff of Etowah County is not personally entitled to the seizure fees provided by Title 29, Section 129, Code of Alabama 1940, but must pay such seizure fees into the county treasury of Etowah County.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion bearing date of September 24, 1947, is as follows:

"Please clarify your opinion contained in Quarterly Report of Attorney General, Vol. 46, P. 41, January 1947 through March 1947, as applies to Sheriff's fee for transferring Insane persons to Hospital on Local Sheriff's Salary Bill, of Etowah County.

"We respectfully request an opinion, also, on whether or not the Sheriff of Etowah County may be entitled to Seizure Fees on Violation of Prohibition Law Cases."

You first request that we please clarify the opinion rendered to Hon. C. M. Garrett, Sheriff, Cherokee County, Centre, Alabama, under date of February 5, 1947, appearing in Quarterly Report of Attorney General, Vol. 46, page, 41, as that opinion applies to the Sheriff of Etowah County under the provisions of Act No. 318, General Acts 1947 (Ms.), approved August 15, 1947.

The act dealt in the opinion herein above referred to was Act No. 162, Senate 210, Local Acts 1943, p. 78. This act placed several of the county officers of Cherokee County, one of whom was the sheriff, on a salary basis. The provision of this act applicable to the question propounded by you is contained in Section 2 thereof and is as follows:

"Section 2. That when this Act goes into effect each of said officers named in Section 1 of this Act shall continue to collect all legal charges, fees, costs, compensations and allowances heretofore or hereafter authorized to be collected by them or any one of them and shall pay same into the County Treasury on the first Monday of each month thereafter. * * * * *"

The provisions of Act No. 318, supra, applicable to the question here considered are found in Section 2 of that act and are as follows:

"Section 2. That when this Act goes into effect said sheriff of Etowah County shall continue to collect all charges, fees, compensation, allowances, and reimbursements heretofore or hereafter authorized to be collected by him, or by any of his deputies or assistants acting under and by virtue of their offices, and shall on the last day of each calendar month pay into the county treasury of Etowah County, Alabama, all such monies received, or collected, by him, or any of his deputies or assistants, during such month."

It is to be noted that the provisions in regard to the charges, fees, costs and compensation allowed to the sheriffs in the two acts are identical in legal effect.

You are, therefore, advised that the opinion appearing in Quarterly Report of Attorney General, Vol. 46, page 41, herein above referred to is now equally applicable to the Sheriff of Etowah County.

Your second question is: Are you, as Sheriff of Etowah County, personally entitled to the seizure fee provided for by Title 29, Section 129, Code of Alabama 1940, in view of the provisions of Act No. 318, supra?

My answer to this question is in the negative.

Your attention is called to the case of *Jefferson County v. Dockerty*, 30 So. 2d 469, certiorari denied in *Jefferson County v. Dockerty*, 30 So. 2d 474.

In this case the Court of Appeals, as well as the Supreme Court, had occasion to consider the question as to whether or not a deputy sheriff, under the provisions of a similar act applicable to Jefferson County, placing the sheriff and his deputies on a salary basis, was entitled to the seizure fee provided for by Title 29, Section 129, Code of Alabama 1940. Both the Court of Appeals and the Supreme Court answered this question in the negative, and held that due to the wording of Section 129, supra, neither the sheriff nor his deputies who were on salaries were personally entitled to this seizure fee.

You are, therefore, advised that under Act No. 318, supra, you, as Sheriff, and your deputies must continue to collect this seizure fee but must cover same into the county treasury of Etowah County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 21, 1947.

Hon. W. H. MacGregor,
Secretary-Treasurer,
Teachers' Retirement System,
Montgomery, Alabama.

Schools—Teachers Retirement System.

1. Retired substitute teacher, who is paid individually by teacher from whom he or she substitutes, is not considered as receiving compensation out of public school funds.

2. Retired teacher may do substitute teaching only in accordance with rules and regulations of the Board of Control of the Teachers Retirement System.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of April 17, 1947, is as follows:

"The status of a teacher retired under provisions of Chapter 14 of the Code of Alabama of 1940 is defined in the sections of said chapter which read in pertinent part as follows:

"Section 263. DEFINITIONS.—"Service" shall mean service as a teacher. "Retirement" shall mean withdrawal from active service with a retirement allowance or optional benefit in lieu thereof granted under the provisions of this chapter.

"Section 366. BENEFITS.—(1) (a) Any member in service may retire upon written application to the board of control setting forth at what time, not less than thirty days nor more than ninety days subsequent to the execution and filing thereof, he desires to be retired, provided, that the said member at the time so specified for his retirement shall have attained age sixty, and notwithstanding that during such period of notification he may have separated from service. (b) Any member in service who has attained age seventy shall be retired forthwith, provided that with the approval of his employer he may remain in service until the end of the school year following the date on which he attains age seventy."

"It will be appreciated if you will let me have your opinion as legal adviser to the Board of Control in reply to the following question which has been submitted to this office by Mr. W. E. Putnam, Director of Attendance and Research, Birmingham City Board of Education:

"If a teacher who has retired does substitute teaching for any system in Alabama and is paid by the teacher for whom she substitutes and not by the school system, will this be considered as receiving public school money? Under the law, could she do this substitute teaching?"

I am of the opinion that the first part of your inquiry should be answered in the negative.

Act No. 236, General Acts 1945, page 357, approved July 7, 1945, provides for reimbursing local school boards for payments to substitute teachers replacing teachers on sick leave and for a sick leave plan. Ordinarily, substitute teachers should be paid from public school funds. However, when a retired substitute teacher is paid individually by the teacher for whom he or she substitutes, such, in my opinion, does not amount to the receiving of public school money.

In answer to the second part of your inquiry, it is my opinion that a retired teacher may do substitute teaching only when the same is done in accordance with the rules and regulations promulgated by the Board of Control of the Teachers Retirement System.

Title 52, Section 367, Code of Alabama 1940, as amended by Act No. 61, General Acts 1943, page 35, approved June 1, 1943, provides, in part, as follows:

"§ 367. Administration—(1) The general administration and responsibility for the proper operation of the retirement system and for making effective the provisions of this chapter are hereby vested in a board of trustees which shall be known as the board of control and shall be organized immediately after a majority of the trustees provided for in this section shall have qualified and taken the oath of office. * * * (7) Subject to the limitations of this chapter the board of control shall, from time to time, establish rules and regulations for the administration of the funds created by this chapter and for the transaction of its business. * * *"

Pursuant to the above, the Board of Control of the Teachers Retirement System promulgated the following in regard to retired teachers acting as substitute teachers:

"(a) A retired teacher receiving a regular retirement allowance including a pension payable from funds provided by the State's contribution cannot be employed as a teacher or in any other capacity in the public schools or colleges of Alabama and receive payment for services rendered in such employment from public funds.

"(b) A retired teacher who has not attained age seventy may be employed in the public schools or colleges of Alabama provided the employer of such retired teacher applies to the Board of Control

for approval of such employment. During a period of employment approved by the Board of Control, the pension payable to a retired teacher shall be suspended. Upon termination of the employment, the retired teacher may be restored to the pension list.

"(c) A retired teacher may be employed in the public schools of a state other than Alabama without forfeiting his right to receive payment of regular retirement allowances. A retired teacher may also enter employment as a teacher in a private school or in any other type of employment other than employment as a teacher in the public schools of Alabama without affecting his right to receive payment of his regular retirement allowance."

The above rules were adopted upon the theory of improving the educational opportunity of the children of the State by providing for the orderly retirement of teachers who become inefficient because of age or disability.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 31, 1947.

Hon. Phillip J. Hamm, Commissioner,
State Department of Revenue,
CAPITOL.

License Tags—Motor Vehicles.

1. Jeep Station Wagons designed to carry freight, merchandise and sometimes passengers, held liable for truck license tag in accordance with Title 51, Section 697, Code of Alabama 1940.

2. Jeeps primarily designed to carry passengers held liable for automobile license tags in accordance with Title 51, Section 693, Code of Alabama 1940.

3. The determination of whether an automobile is a "motor truck" or a "private car" within the meaning of the revenue laws of the State of Alabama, with reference to the proper license for the same, is a question of fact.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, received by this Department under date of October 14, 1947, is as follows:

"The Willys Overland Motors, Inc., manufactures two vehicles, one of which is classified as 'jeep station wagon' and the other as 'universal jeep.' The jeep station wagon is classified by the manufacturer as a station wagon and is given the capacity of 1-7 passengers. The universal jeep is an open body vehicle and is given the factory rating capacity of two-fifth ton. Please give me your official opinion on whether or not these vehicles, or either of them, should be classified by weight and a license tag required therefor as provided by Section 693, Title 51, Code of Alabama 1940, or whether or not they, or either of them, should be classified as trucks and a truck tag required therefor as provided under Section 697, Title 51, Code of Alabama 1940.

"As the probate judges over the State will begin selling automobile tags on October 1, I shall greatly appreciate it if you will give me your answer to the above at your very earliest convenience."

In my opinion a Jeep Station Wagon is a "motor truck" within the definition of same as provided for in Title 51, Section 692(j), Code of Alabama 1940, and should properly carry a truck license tag in accordance with Title 51, Section 697, Code of Alabama 1940.

A station wagon has detachable seats which can accommodate passenger operation of the vehicle, but the vehicle is equipped primarily for freight hauling. The fact that this vehicle is capable of being operated as a private passenger car cannot bring it within the exception set forth in Title 51, Section 692(j), supra, which reads as follows:

"Section 692. Definitions.—The following words and phrases used in this article shall have the meanings herein ascribed to them:

* * * * *

"(j) 'Motor truck': Any motor-propelled vehicle designed for carrying freight or merchandise or drawing a semi-trailer truck on not more than two axles and not operated or driven on fixed rails or tracks; but it shall not include self-propelled vehicles equipped primarily for passenger transportation. * * * * *

Your attention is invited to an opinion of this office to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, under date of November 1, 1939, (Quarterly Report of Attorney General, Vol. 17, page 172). In that opinion a station wagon was held to be a "motor truck."

In regard to a Jeep as such, and without modifications, I am of the opinion that said vehicle should be considered as a "passenger car" within the definition of automobiles as set forth in Title 51, Section 692(b), Code of Alabama 1940, and should properly carry a license tag for a private car in accordance with Title 51, Section 693, Code of Alabama 1940. A Jeep as such, and without modification, is primarily designed for passenger transportation and, as such, it is within the exception found

in the definition of a "motor truck" as found in Title 51, Section 692(j), supra.

While it is true that a Jeep may be used for many varied purposes, the fact remains that the Jeep is equipped primarily for passenger transportation. The use to which a vehicle is put is not determinative of the question of whether the vehicle is a "private car" or a "motor truck," as each is defined by the Code of Alabama. In this connection, your attention is invited to an opinion of this office to Hon. W. H. Hubbard, Judge, City Court, Jasper, Alabama, under date of December 9, 1942, (Quarterly Report of Attorney General, Vol. 29, page 83), wherein the following appears, to-wit:

"The mere fact that a Plymouth Sedan car is used by the owner to haul merchandise for sale to individuals does not change the private car character or classification of the same."

Your attention is also invited to the problem involved concerning modified Jeeps. In many instances Jeeps have been modified to such an extent that they cannot be considered as equipped or designed primarily for passenger transportation. In these instances a Jeep will require a truck license tag in accordance with Title 51, Section 697, supra. However, the determination of such a matter is a question of fact to be decided in each and every particular case.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 31, 1947.

Hon. C. J. Coley,
Judge of Probate,
Tallapoosa County,
Dadeville, Alabama.

Elections—Courts of County Commissioners.

1. County governing body is not authorized to consolidate election districts in violation of Title 17, Section 79, Code of Alabama 1940.

2. It is within the discretion of the county governing body to divide an election precinct into election districts, provided such division has reasonable relation to the requirements that not more than three hundred voters shall be contained in one election district.

3. If no suitable building whatever is available in any election district, which may be designated by the county gov-

erning body as a place for holding of elections in said district, the county governing body has limited authority to erect such a building or place, either on land owned or leased by the county, at the expense of the county, for elections in said election district to be held therein.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of August 29, 1947, is as follows:

"I will appreciate an official opinion by your office, answering the following questions relative to a division and formation of election districts in precinct #2, Tallapoosa County, Alabama. Precinct #2 takes in all the area of the city limits of the town of Alexander City, and in addition thereto it embraces the adjoining territory for several miles in every direction from the city limits or boundary line of the municipality. There are approximately twenty five hundred qualified electors in precinct #2. At the present time precinct #2 is divided into four districts and are identified as district #1-2-3-4, precinct #2. Each of the districts have three hundred or more qualified electors, some have as many as nine hundred.

"Title 17, Section 80, Code of 1940, makes it mandatory that the County Governing Body rearrange the election districts in a precinct so that no one district therein shall contain over three hundred votes.

"The Courthouse or City Hall in Alexander City is a municipal owned building and is the only Public Building in election precinct #2 in which an election can be held.

"Please answer the subsequent questions in numerical order as propounded.

"(1) Can the County Governing Body by Title 17, Section 81, Code of 1940, readjust the boundary lines of election districts #1-2-3-and-4, precinct #2, and consolidate the four districts into one, and have one voting place, using the Courthouse as such center, establishing 8 voting booths in the Courthouse, designating each booth by a given number, requiring electors whose name begins with a certain alphabet to vote in the designated booth for that particular alphabet?

"(2) If your answer to question No. 1 is in the negative, then would it be legal for the County Governing Body to establish a sufficient number of election districts in precinct #2, using the

Courthouse for a voting place for a part, or for all of the seven or eight districts, segregating each voting booth by a designated or established line running through out the precinct and same passing through the Courthouse?

"(3) Can the County Governing Body appropriate from the General Fund Account of the County money to erect a suitable building to be used as a voting place on lands that do not belong to the County?

"(4) If your answer to question No. 3 is in the negative, then can the County Governing Body appropriate County Funds to erect a building for the specific purpose to be used as a voting place on lands owned by the county?"

In my opinion, your first question should be answered in the negative. The consolidation of the four districts would be prohibited under Title 17, Section 79, Code of Alabama 1940, which provides as follows:

"§ 79. Number of voters in district.—No election district within this state shall contain more than three hundred legal voters except in districts where voting machines are used."

In answering your second question, it is my opinion that is within the discretion of your county governing body to divide precinct two into election districts as outlined in your request. The county governing body is authorized to adjust the boundaries of election precincts whenever such readjustments have reasonable relation to the requirements that not more than three hundred voters shall be contained in one election district.—Biennial Report of Attorney General, 1934-36, page 331.

I am answering your third and fourth questions together.

This office has held that if no building whatever is available in an election district which may be designated by the county governing body of a county as the place for the holding of elections in said election district, then the county governing body has the authority to erect such a building or place, at the expense of the county, for elections in said election district to be held therein; but this should not be done until the county governing body has exhausted every effort to designate a building in said election district as the place for the holding of elections in the same, and has made absolutely certain that there is no such place in said election district that can be so designated.—Quarterly Report of Attorney General, Vol. 11, page 6.

This limited authority to erect such a building carries with it, by implication, the authority to acquire the land upon which the building may be erected. If the county does not own a suitable site for the building, the county governing body may acquire by lease, or by purchase,

such a site. Of course, the county governing body should not place a building on someone else's land, unless the county is protected by a lease of the land for a period of time which, in the opinion of the governing body, would protect the county in improving land that does not belong to it.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 31, 1947.

Hon. R. G. Redden,
County Attorney,
Lamar County,
Vernon, Alabama.

Municipalities—Lands—Parks.

A municipality is without authority to convey to an individual, for private commercial purposes, lands dedicated to such municipality for use as a public park.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of September 6, 1947, is as follows:

"Please give me opinion on the following proposition.

"1887, a citizen of Kennedy, Alabama, dedicated to the Town of Kennedy, Alabama, a piece of land in corporate limits, as a park; he laid off town lots and streets surrounding said piece of land; said piece of land has lain out and has been used by the people as a playground and other purposes not of a business nature, except some times people would stack crossties on it. Now proposition is.

"Can the Town of Kennedy dispose of said property to a person on which to erect an Ice Plant for private purposes.

"I notice in paper that you have made a ruling on a similar proposition recently. Will appreciate an opinion."

It is my opinion that your inquiry must be answered in the negative.

In your request for opinion, you state that the property here in question was dedicated by a private individual to the Town of Kennedy, Alabama, for use as a public park and has been used for such purpose, with minor exceptions, since the date of such dedication. You now inquire as to the right of the municipality to convey a portion of such property to an individual, to be used for private commercial purposes.

The general rule regarding the right of a municipality to enter into such a transaction is found expressed in 26 C. J. S., Dedication, Section 65, and is as follows:

"Except as appears below, if a dedication is made for a specific or defined purpose, neither the legislature, a municipality or its successor, nor the general public has any power to use the property for any other purpose than the one designated, whether such use be public or private, and whether the dedication is a common-law or a statutory dedication; and this rule is not affected by the fact that the changed use may be advantageous to the public. This can only be done under the right of eminent domain. On the other hand, the municipality cannot impose a more limited and restricted use than the dedication warrants.

"Dedication to general public uses. It is only where property is dedicated generally without restriction to the use of the public that the public has a free hand in applying the property to such uses as it may desire. * * * *

A question quite similar in nature to that presented by your inquiry was considered by the Supreme Court of Alabama in the case of *Douglass v. City Council of Montgomery*, 118 Ala. 599, wherein the Supreme Court held that municipal corporations hold titles to streets, public squares, and parks in trust for the public, and where lands have been dedicated and used for a public park, or square, the municipality has no power, unless specially authorized by the Legislature, to sell such lands for its own benefit, or to appropriate them for the use and benefit of private persons or corporations, or in any way to divert them from the uses to which they were originally dedicated.

It is of importance to note that the holding in this case has been cited with approval by the Supreme Court of the State in numerous subsequent decisions including those rendered in the cases of *Wakefield et al. v. Town of Carbon Hill et al.*, 215 Ala. 22, 108 So. 855; *Brown et al. v. Tuskegee Light & Power Co.*, 232 Ala. 361, 168 So. 159, and *City of Birmingham et al. v. Hood-McPherson Realty et al.*, 233 Ala. 352, 172 So. 114.

Some pertinent excerpts from the *Douglass* case, *supra*, bearing directly upon the question here presented are as follows:

"It is stated in 15 Am. & Eng. Encyc. of Law, 1064, that 'Municipal corporations hold the title to streets, alleys, public squares,

wharves, etc., in trust for the public; and upon principle, such trust property can no more be disposed of by the corporation than can any other trust property held by an individual.' In the note to the text, many decisions are cited in support of the principle stated. So, it has been held, that trustees of a town have no authority to convey streets, alleys or public grounds, and such conveyances are absolutely void.—*Giltner v. Trustees of Carrollton*, 7 B. Monroe, 680; *Morris v. Improvement Co.*, 38 N. J. Eq. 304, and authorities there cited; *Harn v. Common Council*, 100 Ala. 200; *Webb v. City of De-mopolis*, 95 Ala. 116.

* * * * *

"Judge Dillon states the rule to be, that 'municipal corporations possess the incidental and implied right to alienate or dispose of the property, real or personal, of the corporation of a private nature, unless restrained by charter or statute; they can not, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, and they can not, except under valid legislative authority, dispose of the public squares, streets, or commons.'—2 Dillon on Munic. Corp., §§ 575, 650 and numerous authorities cited. Another phase of the rule should be added in this connection, as we find it stated in the Encyclopedia: 'When lands, held by a municipality for public use, are not subject to any special trust, the legislature may authorize a municipal corporation to sell and dispose of the same, or to apply them to uses different from those to which they are devoted; but in the absence of such authority, the municipality has no implied power to do so. * * If, however, the lands have been dedicated by private individuals for a public park or square, the legislature has no authority to authorize any diversion from the uses to which they were originally dedicated.'"

It is, therefore, my opinion that the Town of Kennedy may not lawfully dispose of property dedicated to such municipality by an individual for use as a public park.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

October 31, 1947.

Hon. Haygood Paterson, Commissioner,
Department of Agriculture and Industries,
CAPITOL.

Alabama State Markets Board—Leases—Contracts.

Release of a part of a site, leased to Alabama State Markets Board under Act No. 32, General Acts 1943, page 26, is within the sound discretion of said Board.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of October 21, 1947, is as follows:

"Attached hereto is the original and copy of lease made by the Cullman County Producers Association to the Alabama State Markets Board. It will be noted from the terms of the lease that this is given to the State Markets Board in order to protect the investment in the building that was installed by the Markets Board.

"Under the terms of the lease the Cullman County Producers Association is to pay to the Markets Board five percent of the capital investment each year with no interest. The Producers Association is now behind with these payments and it is the opinion of the State Markets Board that the Producers Association may utilize seven of the eleven acres of land that is covered by the lease to the extent of being able to help in making the five percent payment to the Board.

"Does the State Markets Board have authority to release the seven acres to the Cullman County Producers Association?

"Your opinion on this matter will be greatly appreciated at your earliest convenience."

In my opinion, your question is a matter that is within the discretion of the Alabama State Markets Board.

Section 3 of Act No. 32, General Acts 1943, page 26, approved May 21, 1943, provides as follows:

"Section 3. The board is hereby authorized to acquire by purchase, donation, lease or condemnation, for and in the name of the State of Alabama, a suitable site or sites, accessible to highways and railroad and air terminal facilities, and to erect and install thereon such structures, facilities, and equipment as may be necessary for the inspection, grading, standardization, classification, refrigeration, dehydration (for both food and feed), canning, packing, processing, cold storage and marketing of agricultural products, including all staple food crops, fruits, vegetables, poultry, dairy products, fish, and kindred products, and to let or lease space and facilities in such markets for the storage of such products pending inspection, grading, packing, canning, processing, classification, refrigeration, dehydration of such products (for both food and feed), and marketing, and to make such charges for such space, services, and facilities, as will cover the reasonable costs of operation and maintenance of such

markets, equipment, and facilities; provided, however, that such charges shall not be made with a view to producing any revenue or profit to the State of Alabama or to the board but shall be based exclusively upon the reasonable cost of operation and maintenance as aforesaid, and liquidation of costs of construction."

The right to lease a site impliedly carries with it the right to release any part of the site. Of course, the Board should not release part of a site unless in the opinion of the Board, it would be benefited by releasing a part of the site to the lessor.

I am herewith returning the file in question.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 31, 1947.

Hon. G. H. Howard,
Judge of Probate,
Elmore County Commissioners' Court,
Wetumpka, Alabama.

Counties—Agriculture and Industries.

Elmore County authorized to appropriate county funds to the Elmore County Artificial Breeding Association, a non-profit organization, organized for the purpose of developing and promoting a better cattle program for the county.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of October 23, 1947, is as follows:

"The Elmore County Jersey Cattle Association with the aid of the County Farm Agent has recently organized a program for the artificial breeding of cows in this county. This is a non-profit organization and was organized for the purpose of developing and promoting a better cattle program for the County.

"Our Court has been requested to make an appropriation of \$500.00 to the Elmore County Artificial Breeding Association to aid in the purchase of necessary equipment to carry out this work.

"We are in favor of this program and would like to make this appropriation if we can legally do so.

"Please advise if we can make this appropriation and if so would we make payment in a lump sum to this organization or would payment be made to the equipment companies for this equipment."

In my opinion, your question should be answered in the affirmative. The manner of making the appropriation is a matter that is within the discretion of the county governing body. Title 12, Section 12, Subsection 22, Code of Alabama 1940, as amended by Act No. 344, General Acts 1945, page 560, provides in pertinent part as follows:

"To set aside, appropriate and use county funds or revenues for the purpose of developing, advertising and promoting the agricultural, mineral, timber, water, labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties. * * * *"

Vol. 3, Permanent Edition 3, Words and Phrases, Page 46, provides in part as follows:

"Literally, 'agri cultura' means the tillage or cultivation of the soil, but is regarded as synonymous with husbandry, and includes, not only cultivation of soil and raising of crops, but also gathering in the crops, raising livestock, marketing products of the soil and the increase and products yielded by stock, such as wool and milk. 'Agriculture' is the cultivation of soil for food products or any other useful or valuable growths of the field or garden; tillage, husbandry; also, by extension, farming, including any industry practiced by a cultivator of the soil in connection with such cultivation, as breeding and rearing of stock, dairying, etc. *Kenney v. Beasman*, 182 A. 566, 568, 569, 169 Md. 582, 103 A. L. R., 1515."

This office has held that county governing bodies may appropriate and expend funds for the following matters in connection with the agriculture growth of the counties.

County governing bodies authorized to appropriate and expend funds in assisting the Production Marketing Association in the payment of office rent in the furtherance of and promotion of agriculture.—Quarterly Report of Attonrey General, Volume 46, page 127;

To purchase a motion picture machine for the sole use of County Extension Service Agents in projecting visual education on farm subjects.—Quarterly Report of the Attorney General, Volume 39, page 52;

To appropriate county funds for club house in promotion of agriculture.—Quarterly Report of Attorney General, Volume 20, page 51;

To furnish Farm Security Administration with telephone.—Quarterly Report of Attorney General, Volume 18, page 344;

To aid in payment of the administrative expenses of the officers of the Farm Security Administration.—Quarterly Report of the Attorney General, Volume 17, page 399;

To compensate an employee of the Triple A for additional and independent services performed for the county.—Quarterly Report of the Attorney General, Volume 17, page 247;

To pay the salary of an assistant for the Farm Security Administration program.—Quarterly Report of the Attorney General, Volume 10, page 132;

To install and maintain exhibit of agricultural resources.—Quarterly Report of the Attorney General, Volume 9, page 80;

To appropriate money for soil erosion and promotion of agriculture.—Biennial Report of the Attorney General, 1934-36, page 294;

To make an appropriation for the promotion of agriculture.—Biennial Report of the Attorney General, 1932-34, page 430.

The premises considered, it is my opinion that the County Commissioners' Court of Elmore County may legally appropriate five hundred dollars to the Elmore County Artificial Breeding Association, a non-profit organization which was organized for the purpose of developing a better cattle program for the county.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

October 31, 1947.

Hon. E. C. Wiggins,
Hon. O. R. Preston,
Councilmen of the Town,
Dale County,
Midland City, Alabama.

Municipalities—Corporations—Appropriations.

Town of Midland City not authorized to contribute municipal funds to Midland City Athletic Association, a non-profit cor-

poration, for constructing an athletic field at the Midland City High School and operating concessions at the field.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of October 14, 1947, is as follows:

"We are two Councilmen of the Town of Midland City, Alabama, and we desire to submit the following question for an opinion:

"Can the Town Council for the Town of Midland City, Alabama, legally contribute money to the Midland City Athletic Association, which is an association of individuals created for the purpose of building and constructing an athletic field at the Midland City High School and also for the purpose of operating the concessions on this field?

"This association has constructed a lighting system on the athletic field and the field is on the property of the State of Alabama which forms a part of the school campus there, and a portion of the lights are on the property owned by the town of Midland City, Alabama. The Athletic Association was formed under Title 10, Section 150 of the 1940 Code of Alabama, a copy of the organization papers of the said association is enclosed herewith for your information.

"It would be appreciated if you would render us an opinion for the benefit of the said Town Council of the Town of Midland City, Alabama, as to whether or not an appropriation from this council is a legal expenditure and one authorized by the law."

In my opinion, your question should be answered in the negative. I have been unable to find any expressed or implied authority for the Town of Midland City to contribute municipal funds to the Midland City Athletic Association.

In the case of *State ex rel. Austin et al v. City of Mobile*, 248 Ala. 467, 28 So. 2d 177, the Supreme Court said:

"In discussing the powers which a municipal corporation possesses and which it can exercise this court has often used these words: 'It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and

purposes of the corporation, not simply convenient, but indispensable.' * * * * *"

McQuillin on Municipal Corporations, Second Edition, Revised, Vol. 1, paragraph 380, page 1046, provides in part as follows:

"§ 380. Appropriations as donations forbidden. Unless expressly authorized by charter or statute, a municipal corporation cannot appropriate or give away the public moneys as pure donations to any person, corporation or private institution, not under the control of the city and having no connection with it. Appropriations for national guards, vote of money to purchase uniforms for an artillery company, or for sports and games, or a donation fund for the erection of a building for the use of the G. A. R. are examples. * * * * *"

This office has held that municipalities are not authorized to make donations to the Chamber of Commerce.—Quarterly Report of Attorney General, Volume 39, page 32.

I realize that this Athletic Association will provide a valuable service to your community, but, under the existing laws, I am constrained to answer your question in the negative.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 4, 1947.

Hon. E. T. Knight, Chairman,
Board of Revenue,
Cullman County,
Cullman, Alabama.

Counties—Agriculture and Industries—Libraries.

1. If Cullman County is selected to be in the North Alabama Horticultural Area, Board of Revenue of said county may appropriate county funds to purchase a site to be donated to the Alabama Polytechnic Institute for the Sub-Agricultural Experiment Station for Horticultural Research under Act No. 380, General Acts 1947 (Ms.), approved September 16, 1947.

2. Counties may appropriate county funds to the public library to help with the operation of a bookmobile.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of October 13, 1947, is as follows:

"Will you please advise us if it is legal for the County to buy 100 acres to be used as a State Experiment Station, which is to be located in North Alabama, also

"Is it legal to appropriate money to the Public Library to help with the operation of a bookmobile?"

In considering your first question, I have carefully examined Act No. 380, General Acts 1947 (Ms.), approved September 16, 1947, which provides for a Sub-Agricultural Experiment Station in the North Alabama Horticultural Area and find the following: (a) That before your county will be in the North Alabama Horticultural Area, it has to be selected by the Director of the Agricultural Experiment Station; (b) That the site for the station must consist of not less than one hundred twenty acres of land which has been approved in writing by the Director of the Agricultural Experiment Station of the Alabama Polytechnic Institute; (c) That the site donated shall be conveyed to the Alabama Polytechnic Institute in fee simple.

In my opinion, if Cullman County is selected to be in the North Alabama Horticultural Area, then the Board of Revenue of Cullman County may appropriate county funds to purchase one hundred twenty acres of land to be donated to the Alabama Polytechnic Institute for the Sub-Agricultural Experiment Station for Horticultural Research.

I call your attention to Sections 1, 2, 3 and 6 of Act No. 380, General Acts 1947 (Ms.), approved September 16, 1947, which provides as follows:

"Section 1. That there is hereby created a Sub-agricultural Experiment Station for Horticultural Research in the North Alabama Horticultural Area, at such place as may be selected by the Director of the Agricultural Experiment Station, that the objects and purposes of said Sub-Agricultural Experiment Station for Horticultural Research shall be to conduct investigations bearing directly on the production, processing, preparation, storage, use, and marketing of horticultural crops and products including such scientific investigations as have for their purpose the establishment and maintenance of a permanent and efficient horticultural industry; and for the printing and dissemination of the results of said researches.

"Section 2. That the counties of the State of Alabama constituting the North Alabama Horticultural Area are such counties in

North Alabama as may be selected by the Director of the Agricultural Experiment Station.

"Section 3. That the Director of the Agricultural Experiment Station and the Director of the Agricultural Extension Service of the Alabama Polytechnic Institute and the Director of Vocational Education of the Alabama Department of Education shall visit and study in detail the Cullman County Horticultural Area for the purpose of selecting a site for such Sub-Agricultural Experiment Station for Horticultural Research, giving special emphasis to the character and type of soil which would be most typical and representative of the region, and including such other important items as convenience of location and accessibility, all with the view of making the results of the research work most helpful and most useful to the horticulture of the area. No property shall be accepted for any of the purposes of this Act until its suitability therefor has been approved in writing by the Director of the Agricultural Experiment Station of the Alabama Polytechnic Institute. This approval shall be certified to the State Comptroller by the said Director, along with a certificate that not less than 120 acres of such suitable land has been donated to the Board of Trustees of the Alabama Polytechnic Institute for carrying out the purposes of this Act, before any of the monies herein appropriated to the Board of Trustees of the Alabama Polytechnic Institute for the purpose of creating and establishing said Sub-Agricultural Experiment Station for Horticultural Research shall be released by him to the Board of Trustees of the Alabama Polytechnic Institute for such purposes."

"Section 6. That county boards of revenue or county commissioners, or other bodies having similar jurisdiction, in the North Alabama Horticultural Area and any municipality in said area shall have full power and authority to appropriate funds for any of the purposes of this Act. That the Board of Trustees of the Alabama Polytechnic Institute is hereby authorized and empowered to receive such donations, as well as donations from individuals, firms, organizations, corporations and companies for forwarding the purposes of this Act, provided that any land so donated shall be conveyed to the Alabama Polytechnic Institute in fee simple. Any county or counties in which said Sub-Agricultural Experiment Station for Horticultural Research shall be located is/are hereby authorized to borrow any sum of money needed for the purchase of lands therefor, at a rate of interest not to exceed five percent per annum payable over a period of not to exceed ten years and to pledge any part of its or their general funds to the payment thereof."

In my opinion, your second question should be answered in the affirmative. This office has held that counties are authorized to make appropriations for the establishing or maintaining of free libraries for the use of their respective citizens.—Quarterly Report of Attorney General, Vol. 25, page 104. Quarterly Report of Attorney General, Vol. 19, page 126.

It is common knowledge that one of the modern methods of furnishing library facilities to the public is to take the books to the people who are not able to come to the library.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 4, 1947.

Hon. J. A. Logue,
Judge of Probate,
Houston County,
Dothan, Alabama.

Counties—Court of County Commissioners—Directories—

County is without authority to purchase city and county directory for the use of the various offices in the county courthouse in general.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of August 29, 1947, is as follows:

"The various offices in the Court House desire to purchase a City and County directory that is being compiled.

"I have been advised that this cannot be paid for out of county funds. Will you please advise me if this is correct?"

I find no authority of law for the county to provide a city and county directory for the various offices in the county courthouse in general. Before the county commissioners can pay for equipment of any character for offices or officers, it must be able to point to some direct statute or construction of a statute authorizing the same. The court of county commissioners is purely a creature of statute and, therefore, has only such authority as is expressly stated in the statute or statutes.

A previous opinion of this office held that Tuscaloosa County could provide its sheriff with a city directory under the provisions of a local act as applicable to the sheriff of said county. However, said opinion also held that under the general law, said county had no authority to furnish its circuit clerk with such a directory.—Quarterly Report of Attorney General, Vol. 13, page 69. This part of said opinion followed

an earlier opinion holding that there is no authority for the county to pay for a city directory for the use of the sheriff.—Quarterly Report of Attorney General, Vol. 2, page 314.

In the case of *State ex rel. Towle v. Stone*, County Treasurer, 236 Ala. 82, 181 So. 281, Justice Gardner, speaking for the Supreme Court, quoted with approval the statement made by the court in *Board of Revenue and Road Commissioners of Mobile County v. State ex rel. Drago*, 172 Ala. 155, 54 So. 995, as follows:

“The law of this state (however it may be in other jurisdictions) is long and well settled that counties are governmental agencies of the state, and that they are therefore chargeable with and liable for those claims or demands—and those only—which the law imposes upon them, or empowers them to contract for. No officer can charge the county with the payment of any claim due him, however meritorious or whatever benefit the county may derive therefrom, unless expressly or by necessary implication authorized by law. * * * * *

Based upon this quotation from Justice Gardner's opinion, the opinions of this office and the fact that I find nothing in the current code of Alabama authorizing such expenditures, I am of the opinion that the conclusion reached herein is justified.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 5, 1947.

Hon. S. Fleetwood Carnley,
Director of Industrial Relations,
711 High Street,
Montgomery, Alabama.

Industrial Relations—Circuit Courts—Appeals.

Decisions of the circuit courts of the State in those matters appealed to such courts from the decisions of the Board of Appeals created by and under the authority of Title 26, Section 8, Code of Alabama 1940, as amended, are binding and controlling upon said Board of Appeals only as to those parties and issues involved in the particular case, and do not establish principles of law which must be followed by the Board of Appeals in subsequent matters brought before such Board.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of September 18, 1947, is as follows:

"By virtue of the authority provided in section 8, Title 26, 1940 Code of Alabama, the Governor has appointed a board of appeals for the Department of Industrial Relations of this State. Among other duties of the said board is that of hearing appeals from decisions of the State Unemployment Compensation Agency affecting unemployment compensation benefit rights of unemployed workers (section 9, Title 26, 1940 Code of Alabama).

"Appeals from decisions of this board are to the various circuit courts in the State (section 221, Title 26, 1940 Code of Alabama).

"Your opinion is respectfully requested with respect to the following query: Is the said board of appeals bound by and required to follow a decision of a circuit court of this State rendered on an appeal taken from a decision of the said board in a subsequent hearing before the board involving parties other than those interested in the former case but with the issues identical. Simply stated, the question is whether the board is required to follow a decision of a circuit court in subsequent cases coming before it where there is no identity of parties, but there is an identity of issue."

There is created by and under the authority of Title 26, Section 8, Code of Alabama 1940, as amended by Act No. 410, General Acts 1943, page 375, a Board of Appeals which, among other powers, is vested with the authority to hear and determine appeals taken from decisions of the State Unemployment Compensation Agency affecting unemployment compensation benefit rights of unemployed workers. Appeal from the decisions of such Board may be taken, by either party, to the circuit court of the county of the residence of the claimant and appeal may be taken from the decision of the circuit court, within thirty days after the final ruling of such court, in the same manner as is provided in civil cases. You inquire as to whether said Board of Appeals is bound by and required to follow a decision of one of the circuit courts of the State in subsequent cases coming before such Board where there is an identity of issues but no identity of parties.

It is my opinion that such inquiry must be answered in the negative.

The circuit court in this particular instance occupies the role of an intermediate court whose decision is appealable to a higher court. Where such decision by an intermediate court is appealable to a higher court, but such appeal is not pursued, the decision of the intermediate court is

the "law of the case" in all subsequent proceedings. Such is the holding in the case of *State ex rel. v. Public Service Commission et al*, 134 S. W. 2d 1069, which decision is cited with approval by the Supreme Court of Alabama in its recent decision in the case of *Avery Freight Lines, Inc. v. Gordon Persons, as President, and W. C. Harrison and James H. Purdue, as Associate Commissioners of the Alabama Public Service Commission*, 3rd Div. 471 (Ms.), dated October 16, 1947.

However, it is my opinion that the decision of the circuit court in such a situation is conclusive only as to the one particular case and the parties thereto and is not controlling or binding in subsequent proceedings between different parties, even though there be an identity of issues involved. In other words, the decision of the circuit court establishes the law as applicable to the one case and stands as the "law of the case" until overturned by a higher court, but such decision in no way establishes a principle of law binding upon said Board of Appeals in subsequent proceedings by different parties brought before such Board. Such principle of law can only be established by a court of last resort, that is, the highest appellate court of the State.

Generally, there cannot be said to be an identity of issues in two suits where the parties are not really and substantially the same, although their separate claims or rights may grow out of the same subject matter and be founded upon the same facts. The true test of the conclusiveness of a former judgment in respect to particular matters is identity of issues. If a particular point or question is in issue in the second action, and the judgment will depend upon the determination of the particular point or question, a former judgment between the same parties will be final and conclusive in the second if that same point or question was in issue and adjudicated in the first suit, otherwise not.—34 C. J., Judgments, Sections 1325-1326.

The State being divided into some twenty-four judicial circuits, it is easy to conceive the confusion that might arise should it be held that the decision of any one of such courts was controlling or binding upon the Board of Appeals here considered. Appeals from the decisions of such Board of Appeals are directed to any one of the circuit courts of the State, depending upon the residence of the claimant. Should such courts issue divergent decisions, as might easily happen, the Board of Appeals would soon find itself at a loss as to what law was controlling upon its decisions.

It is, therefore, my opinion that the Board of Appeals is bound by a decision of a circuit court of the State only as to the issues and parties involved in the particular case and that it is not mandatory that such decision be followed in subsequent proceedings before such Board brought by parties other than those involved in the former suit.—Cf. Quarterly Report of Attorney General, Vol. 1, page 326.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 6, 1947.

Honorable J. T. Jackson, Judge,
Inferior Court of Houston County,
Dothan, Alabama.

Inferior Court of Houston County—Jurisdiction—Clerk.

1. The Clerk of the Circuit Court of Houston County, Alabama, who is by law the Ex-Officio Clerk of the Inferior Court of Houston County, created by Act No. 315, Local Acts 1947 (Ms.), approved August 13, 1947, is required by the provisions of such act to serve as Clerk of the Inferior Court of Houston County in all proceedings had before such court, including those proceedings had when the Judge of such Court is sitting as a committing magistrate, if directed to do so by such judge.

2. Such Clerk is under duty to sign and issue all processes issuing out of the court, including warrants, affidavits, summonses, subpoenas, writs, executions, commitments and releases, and to sign and issue warrants of arrest in felony cases, breach of peace cases and desertion and non-support cases, as well as other misdemeanor cases.

3. Justices of the Peace of Houston County, Alabama may issue warrants of arrest returnable to the Inferior Court of Houston County.

4. The opinion of this office rendered to the Honorable Roy O. Hill, under date of September 24, 1947, is hereby modified and amended to conform to the opinions expressed herein and those parts in conflict herewith are expressly overruled and withdrawn.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

In your letter of October 13, 1947, requesting that I review a certain portion of an opinion of this office rendered to the Honorable Roy O. Hill, Clerk of the Circuit Court of Houston County, Dothan, Alabama, under date of September 24, 1947, which opinion treats the provisions of Act No. 315, Local Acts 1947 (Ms.), approved August 13, 1947, creating and establishing the Inferior Court of Houston County, Alabama, you present the following questions:

“(1) Is it not the duty of the Clerk of the Inferior Court to perform all clerk's functions or clerical functions arising in connection with all criminal and civil cases filed in the Inferior Court of Houston County or instituted before the Judge of said court?

"(2) Would it not be the duty of said Clerk to perform all such services and duties if same are required of him by the Judge of said Inferior Court?

"(3) Would it not be the duty of said Clerk to sign and issue warrants of arrest in felony cases, breach of the peace cases and desertion and non-support cases as well as other misdemeanor cases if called upon to do so and if such warrants are in proper form?"

It is my opinion that each of these inquiries must be answered in the affirmative.

In my opinion of September 24, 1947, mentioned above, the following statement was made:

"In answer to your inquiry marked 1(a), it is my opinion that the Clerk of the Inferior Court of Houston County would not be entitled to the fee of \$2.00 for the use of the county. This \$2.00 fee is allowed the clerk of a county court when acting as clerk to the judge of said county court, when said judge is sitting as a committing magistrate, by virtue of Title 11, Section 91, Code of Alabama 1940. The local act in question contains no authority for the Judge of the Inferior Court of Houston County to act as a committing magistrate; rather his authority to act as such is derived from the general law granting such power to judges of inferior courts. The Clerk of said Court is under no duty to attend or perform any service in connection with preliminary hearings. Title 15, Sections 135 and 136, Code of Alabama 1940, imposes all necessary duties on the committing magistrate himself.—Quarterly Report of Attorney General, Vol. 36, page 32; Quarterly Report of Attorney General, Vol. 10, page 10. The costs in such preliminary hearings are imposed under and subject to the limitations of Title 11, Section 84, Code of Alabama 1940, as amended by Act No. 58, General Acts 1945, page 59, approved June 1, 1945, on the justice of peace scale of fees."

Upon further consideration, it is now my opinion that that portion of the above quoted paragraph wherein it is stated that the Clerk of said Court is under no duty to attend or perform any services in connection with preliminary hearings, all such duties being imposed upon the committing magistrate himself, is not a correct statement of the law in this particular instance.

The Judge of the Inferior Court of Houston County when sitting as a committing magistrate does so not as Judge of said Court nor under any authority vested in such Court by law, but by virtue of the fact that Title 15, Sections 120-122, Code of Alabama 1940, clothe all those persons defined as magistrates by Title 15, Section 399, Code of Alabama 1940, with the power and authority to act as committing magistrates.

It is also true, as a general rule, that, unless otherwise provided by statute, when so sitting as a committing magistrate, all necessary duties are imposed upon the committing magistrate himself. Title 15, Sections 135-136, Code of Alabama 1940.

However, in the instant case, Section 11(a) of the act creating the Inferior Court of Houston County (Act No. 315, *supra*) specifically provides that the Clerk of the Circuit Court of Houston County shall be the Clerk of the Inferior Court of Houston County, it being further provided by Section 11(b) of such act that it shall be the duty of the Clerk "to keep all the records, files, and dockets of the court in an orderly manner and to perform all other duties required by the judge." For the performance of such duties the Clerk is granted additional compensation of \$600.00 per year.

It is, therefore, my opinion that the Clerk of the Circuit Court is bound by the provisions of Act No. 315, *supra*, to serve as ex-officio clerk of the Inferior Court of Houston County in all matters coming before such court, including attendance as clerk when the Judge thereof is sitting as a committing magistrate, if so directed by the Judge. It should be pointed out, however, that, as announced in the opinion of September 24, herein referred to, the Clerk is not entitled to the \$2.00 fee allowed by Title 11, Section 91, Code of Alabama 1940, for the use of the county, the costs of such proceeding being imposed under and subject to the limitations of Title 11, Section 84, Code of Alabama 1940, as amended by Act No. 58, General Acts 1945, page 59.

With reference to your third inquiry, I desire to direct your attention to Section 11(c)2) of Act No. 315, *supra*, which provides that the Clerk of the Inferior Court of Houston County shall have the authority "to sign and issue all processes issuing out of the court, including warrants, affidavits, summonses, subpoenas, writs, executions, commitments, and releases" and to Section 11(b) of such act, above quoted, which provides that it shall be the duty of the Clerk of such courts to keep all the records, files, and dockets of the court in an orderly manner and to perform all other duties required by the Judge.

In view of these provisions, it is my opinion that it is incumbent upon the Clerk of such Court to perform the duties enumerated by you in your third inquiry.

I desire to take this opportunity to consider a second inquiry concerning the opinion of September 24, *supra*, presented by the Honorable L. A. Farmer, Solicitor of the Inferior Court of Houston County, by letter of October 2, 1947.

Mr. Farmer requests that I further consider that portion of my opinion of September 24 wherein it was held that Justices of the Peace could not issue warrants returnable to the Inferior Court of Houston County. I am now of opinion that such holding was in error.

Section 8(a) of Act No. 315, *supra*, provides as follows:

"Section 8.—Criminal Prosecutions. (a) No prosecutions shall be commenced in such court except upon sworn complaint made to either the judge or the clerk of the court, who shall issue a warrant of arrest if he is reasonably satisfied that the offense has been committed and that there is reasonable cause to believe that the accused is guilty.
* * * *"

It is my opinion that such proviso is applicable only to those actions actually commenced in the Inferior Court of Houston County and acts as no bar to an action being commenced in a Justice's Court with affidavit being there made and warrant issued returnable to the Inferior Court of Houston County.

A criminal prosecution is commenced when a warrant on which the defendant is arrested is duly issued in good faith and delivered to the sheriff for service. *State v. Bowman*, 188 P. 242, 106 Kan. 430. The usual commencement of a criminal procedure, according to Wharton, is a preliminary oath before a magistrate, on which a warrant is issued for arrest. *Hartnett v. State*, 42 Ohio St. 568.

A criminal prosecution is commenced on the filing of an affidavit and issuing of a warrant by a committing magistrate, within the meaning of Rev. St. Section 643, 28 U. S. C. A. Section 76, providing that, when any criminal prosecution is commenced in any court of the state, it may under certain circumstances be removed into the United States Court. *Georgia v. Bolton*, 11 F. 217.

It is, therefore, my opinion that in those cases wherein affidavit is made before a Justice of the Peace sitting as a committing magistrate, who thereupon issues his warrant of arrest returnable to the Inferior Court of Houston County, said action should be deemed to have been commenced in the Justice's Court and not in the Inferior Court of Houston County.

Title 13, Section 327, Code of Alabama 1940, vests in Justices of the Peace authority to issue warrants of arrest returnable to the County Court. Under the provisions of Act No. 315, *supra*, the Inferior Court of Houston County is vested with all the power, authority and jurisdiction of the County Court, being created and established in lieu thereof. It is, therefore, my judgment that inasmuch as Justices of the Peace were authorized to issue warrants of arrest returnable to the County Court, such officers may now issue warrants of arrest returnable to the Inferior Court of Houston County, which court replaced the former County Court. The fact that Act No. 315, *supra*, in creating the Inferior Court of Houston County, prescribed the manner by which prosecutions should be commenced in such Court does not prevent such Court from taking cognizance of actions actually commenced in the Justice's Court with warrant of arrest made returnable to the Inferior Court of Houston County.

Accordingly, the opinion of this office rendered to the Honorable Roy O. Hill, under date of September 24, 1947, is modified and amended to conform to the opinions expressed herein, and any portion thereof in conflict herewith is expressly overruled and withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 6, 1947.

Hon. P. S. Owen,
Superintendent of Education,
Chambers County,
LaFayette, Alabama.

Schools—County Board of Education—Municipalities.

A county board of education has the authority to make an appropriation or contribution to a municipality to aid in the construction of a gymnasium, provided the building upon completion will be deeded to the same county board of education and is to be used for school purposes by a county operated school.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1947, is as follows:

"I request your official opinion on the following question: Does a county board of education have legal authority to appropriate school funds to a municipality to aid in the construction of a gymnasium, provided the municipality has by a duly adopted resolution agreed that, upon completion of the gymnasium, it will deed the same to the county board of education to be used for school purposes by a public school operated as a part of the county school system?"

It is my opinion that your question should be answered in the affirmative.

In the case of *State v. County Board of Education of Russell County*, 214 Ala. 620, 108 So. 588, it was held that county boards of education have broad discretion in the administration and supervision of public schools and educational interests of the county. Control over the property and funds of the public schools of the county is vested in the county board of education by Title 52, Section 71, Code of Alabama 1940, which reads as follows:

"Property vested in county board.—All the property, estate, effects, money, funds, claims, and donations now or hereafter vested by law in the public school authorities of any county for the benefit of the public schools of any county are hereby transferred and vested in the county board of education, and their successors in office. Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular county, school district, or public school, shall be held in trust by the county board of education for the benefit of any such county school district or school."

The Code further grants to the county board of education the right to acquire property for school purposes.

Title 52, Section 99, Code of Alabama 1940 reads as follows:

"Powers of county board.—The county board of education shall have the right to acquire, purchase by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract, all contracts to be made after resolutions have been adopted by the board and spread upon its minutes. All processes shall be executed by service on the executive officer of the board." (Emphasis added).

It is my opinion that the county board of education in the present instance is acquiring property for school purposes which is in accordance with the provision of the above quoted code section.

It should also be noted that this office has held in prior opinions that the county board of education may cooperate with a municipality by joining in projects calculated to effect an improvement or benefit to county school property. See Quarterly Reports of Attorney General, Vol. 14, page 19; Vol. 18, page 196; and Vol. 19, page 229.

In the present situation the joint project of the county board of education and the municipality is one which will be a definite improvement to the county school property, as it will mean an actual acquisition of gymnasium facilities. The acquisition of such facilities is in furtherance of school purposes.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

November 6, 1947.

Hon. Haygood Paterson,
Commissioner, State Department of Agriculture and Industries,
CAPITOL.

Agriculture and Industries—Funds.

State Department of Agriculture and Industries has authority under Title 2, Section 406, Code of Alabama 1940, to contribute to the expense of freight rate hearings before the United States Interstate Commerce Commission.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, dated November 3, 1947, is as follows:

"Your official opinion is requested on the question whether the State Department of Agriculture and Industries can lawfully contribute from its funds the sum of \$1,000.00 towards the expense connected with the current hearings before the United States Interstate Commerce Commission on the subject of the proposed nationwide increase of freight rates by interstate railroad carriers."

Your question is answered in the affirmative. Title 2, Section 406, Code of Alabama 1940, provides:

"The commissioner shall have the power to: Inspect and determine the grade and condition of agricultural products both at shipping points and receiving centers within this state, and provide for the issuance of certificates as to grade or condition of such products; inspect, test and examine the containers for agricultural products; investigate, collect and disseminate data and statistics as to the location, quantities and time when available of agricultural products produced, stored or held within this state, information as to the cost and facilities for the transportation, storage and distribution of such products and acquire and disseminate information as to market prices of such products in the markets of the state and other markets; acquire and use such information and data as may be necessary and useful in making recommendations to the public service commission to avoid and prevent discrimination in the transportation of such products of this state and to secure fair and reasonable rates for such transportation; investigate as to the needs of terminal and other distributing facilities for agricultural products and cooperate and advise with corporations, municipalities and other persons concerning the establishment of such facilities; obtain and disseminate such information and data relating to the preceding subjects from outside this state as may be practicable and of value to producers and consumers within this state; investigate the conduct and methods of exchange and

boards of trade within this state for the purchase and sale of agricultural products. The board shall have the power to: Determine and adopt standards for any and all agricultural products as to grade, classification, quality or condition of such products and such other qualifications as may be of value for the purposes of this article; determine and adopt standards for any and all containers for agricultural products and to provide for and require the marking of such containers; include in or exclude from such standards any agricultural products as may appear for the promotion of the purposes of this article and to change such standards as and when such may seem best; make any and all reasonable rules and regulations necessary to carrying out the objects and purposes of this article, not inconsistent with the law." (Emphasis supplied).

It is therefore my opinion that ample authority is given by this statute to the State Department of Agriculture and Industries to contribute to the expense of the current hearings before the United States Interstate Commerce Commission on the subject of the proposed nationwide increase of freight rates by interstate railroad carriers.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

November 13, 1947.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Counties—Courts of County Commissioners—Taxes—Warrants—Bonds.

1. The surplus of the proceeds of the special tax of one-fourth of one per centum levied by a county under the provisions of Constitution of Alabama 1901, Section 215(a), may be used for public building purposes, after provision has been made for the payment of the interest on and the retirement of the principal of bonds to the payment of which the proceeds of said tax were pledged.

2. Under Title 12, Chapter 6, Sections 73-91, Code of Alabama 1940, the "County Financial Control Law," a county is without authority to issue interest bearing warrants against the proceeds of the special tax of one-fourth of one per centum levied under the provisions of the Constitution of Alabama 1901, Section 215(a), for the purpose of securing funds for a proposed office building. However, a county may negotiate a temporary loan in anticipation of the collection of taxes for such purposes under the provisions of Title 12, Chapter 9, Sections

124-128, Code of Alabama 1940, or may issue bonds therefor, pledging the proceeds of such tax to the payment of the same, pursuant to the provisions of Title 12, Chapter 7, Sections 92-109, Code of Alabama 1940.

3. Quarterly Report of Attorney General, Vol. 7, page 8, Biennial Report of Attorney General, 1936-38, page 169, overruled; and Quarterly Report of Attorney General, Vol. 20, page 85, modified.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for an official opinion, bearing date of May 23, 1947, is as follows:

"I desire your opinion on the following:

"On July 29, 1921, the Court of County Commissioner of Dale County, Alabama, issued and sold \$150,000.00 of Road and Bridge Bonds and Road and Bridge Refunding Bonds. This issue of bonds was to run for a period of thirty years from date of issue and are non-callable. They will finally mature on July 29, 1951.

"At the time of their issue and sale, the county governing body levied a special county tax of one-fourth of one per centum on each dollars of assessed tax valuation in Dale County to provide for payment of interest and to create a sinking fund for the final retirement of the principal issue. This levy was made under and by authority of subsection (A) of Section 215 of the Constitution of Alabama. The order to earmark this special tax for the payment of interest and principal of this bond issue appears in Minute Book C, page 403 of the minutes of the Commissioner's Court and reads as follows:

"It is further ordered that there be, and there hereby is, levied upon all the taxable property of Dale County, Alabama, for each of the years 1921 to 1951, both inclusive, a tax sufficient in amount to pay the interest on all of the said bonds as the same falls due, and to provide a proportionate part of the principal thereof, and the proper officers of the said county are hereby commanded annually to assess, levy and collect said taxes, or that there shall be reserved out of the general tax levied in each year, a sum sufficient to pay the interest on all of the said bonds and to provide a proportionate part of the principal thereof, which said sums so levied or reserved shall be set aside and placed in a separate fund and be used only for the purpose of paying interest and principal of the said bonds; and the said County of Dale hereby declares that the foregoing provision for the levy, assessment and collection of taxes to pay the

interest and principal of said bonds is made for the benefit of each and every person who may be, or hereafter become, the owner or holder of any of the said bonds or coupons.'

"From the fund created by taxes levied and collected under the foregoing resolution, all interest has been paid from the issuance of these bonds until the present time.

"Twelve years ago the Commissioners Court began setting aside a definite amount each year for the purpose of purchasing United States Savings Bonds, or United States War Bonds, to be placed in a sinking fund and to be earmarked and held until the maturity of this bond issue, July 29, 1951 and to be used at that time solely and exclusively for the purpose of retiring these bonds at their then maturity. On July 10, 1945, the county had purchased and placed in this sinking fund a total of \$150,000.00 maturity value, of such United States Savings and War Bonds. The interest accruing thereon being sufficient by the date of the maturity of the old bond issue to create a total fund in the amount of \$150,000.00, which will be sufficient to pay off every dollar of that issue on July 29, 1951 when they finally mature.

"The order passed by the Dale County Court of Commissioners on July 30, 1945, finally creating a sufficient sinking fund to pay off the original bond issue, reads as follows:

"'On motion by Commissioner Baldwin, duly seconded by Commissioner Morris, with Commissioners Parker, Morris, Newman and Baldwin, present and voting for the motion, it is ordered that the county treasurer be, and he is hereby authorized, empowered and instructed to cash any of the foregoing described bonds (U. S. Savings and War Bonds in Sinking Fund) as they may mature, prior to January 1951, and to reinvest the proceeds in similar United States Interest Bearing Bonds to be deposited by him in the said county sinking fund, in order that the said fund may benefit from the interest thus earned; the numbers and amounts of the bonds so cashed, together with the numbers and amounts of the bonds substituted therefor, to be entered at the time of such transaction, in the minutes of the proceedings of this Court.

"'And it is hereby further ordered, on the same motion, that such United States Savings and War Bonds as are described in the schedule hereinabove set out, or such as may be cashed for re-investment, in similar bonds from time to time, be held by the county solely and only for the final payment of the county's old bond issue when it finally matures on July 29, 1951, and that this court do not disturb, sell, cash, pledge or otherwise dispose of, or use, such bonds for any other purpose whatsoever.

"'And it is still further ordered that the Judge of Probate and the County Treasurer be, and they are hereby authorized, empow-

ered and instructed to convert into cash all such United States Savings and War Bonds as may be in the said county sinking fund for the payment of the county's old bond issue, on June 1, 1951, and that the proceeds from such sale of bonds be deposited by them in the Road and Bridge fund of the county and used solely and only for the retirement of the county's old bonds when they finally mature on the 29th day of July, 1951.'

"From the foregoing you will see that the county has already provided dollar for dollar for the final liquidation of the \$150,000.00 bond issue of 1921, when it finally matures in 1951. However, since these bonds are non-callable and cannot be paid off until their final maturity, it is necessary that the interest on them be paid until the date of maturity in 1951. But the one-fourth per centum of special taxes levied for the payment of interest and principal brings in considerable more each year than is necessary for the interest payments alone. A surplus of \$8,000.00 to \$10,000.00 is accumulating from this tax yearly.

"The Commissioners Court has under consideration the erection of a county office building to be used for the accommodation of the several county agencies and we would like, if it will be legal, to use the surplus arising from this special tax, over and above the annual interest on the old bond issue, for paying for the erection of the proposed county office building.

"Now, what I specifically wish to know, is this:

"1. May we use the surplus arising from this special tax for other public building purposes, since we already have a sinking fund earmarked for the final payment of the original bond issue?

"2. May the Commissioners Court issue interest bearing warrants against this surplus fund to procure the necessary funds for paying for such proposed office building?

"Your usual prompt attention to the foregoing inquiry will be highly appreciated."

In my opinion, your first inquiry should be answered in the affirmative.

In your request for an opinion, you quote from an order of the Commissioners Court earmarking the special tax levied under the authority of Constitution of Alabama 1901, Section 215(a), for the payment of the interest on and principal of the bond issue in question. It appears from that order that such tax was to be levied for each of the years 1921 to 1951, both inclusive, "sufficient in amount to pay the interest on all of the said bonds as the same falls due, and to provide a proportionate part of the principal thereof," and that the proper officers of said County were commanded annually to assess, levy, and collect the same; or that there

was to be reserved out of the general tax levied each year "a sum sufficient to pay the interest on all of the said bonds and to provide a proportionate part of the principal thereof," and that the sums so levied or reserved were to be set aside and placed in a separate fund and used "only for the purpose of paying interest and principal of the said bonds."

As I construe this order, its only effect, so far as the bonds here under consideration are concerned, was to require that out of the annual proceeds of the special tax levied there should be paid the interest due on said bonds during that year, and there should be set aside a proportionate part of the principal thereof; and that is the only pledge of the proceeds of this special tax to the payment of the interest on and principal of the bonds in question. I do not think that this order pledged the entire proceeds of this special tax each year to the payment of all the interest for all of the years and all of the principal of the bonds in question. Even if it did, it appears that any surplus from the proceeds of said special tax may now be used for any other purpose for which the tax could have originally been levied, after adequate provision is made for the payment of the interest on these bonds from time to time and the principal when the same becomes due.

Apt authority for this conclusion is found in *In re Opinion of the Justices*, 237 Ala. 671, 188 So. 899, which is the opinion dealing with the use of the surplus of the proceeds of the income tax for the reduction of State ad valorem taxes. The constitutional amendment levying the income tax (Amendment XXV—Article XXII) contains the following pertinent provisions:

"The Legislature shall reduce the ad valorem tax from time to time when and to such an amount as the revenue derived from the income tax will justify. * * * All income derived from such tax shall be held in trust for the payment of the floating debt of Alabama until all debts due on Oct. 1st, 1932, are paid and thereafter used exclusively for the reduction of State ad valorem taxes."

After quoting those provisions, the court, in that opinion, spoke as follows:

"Construing the last clause in the section so as to give effect to the whole, it means all income derived from income taxes shall: 1st, be held in trust, not diverted to any other use than specified in the amendment. 2nd, devoted to the payment of the floating debt as a first charge, and any residue from time to time be devoted to reduction of state ad valorem taxes. 'Thereafter' in the last clause must be considered in connection with 'from time to time when,' &c., appearing in the same amendment. So construed, it means, after the demands of the floating debt are met from time to time, the residue shall be applied to reduce state ad valorem taxes, and after the floating debt is fully paid, the income tax shall go wholly to reduction of property tax."

(The last clause in the section referred to in the above quotation is the last clause of the above quoted provision of the amendment.)

Be that as it may, it appears that the action of Dale County in setting aside in a sinking fund for the purpose of retiring the bonds in question, when they mature in 1951, United States Savings and War Bonds with a maturity value before that time of \$150,000.00 (the total amount of the principal of such bonds), is tantamount to payment of the indebtedness.

A similar situation was considered by the Supreme Court in the case of *Taxpayers and Citizens of Shelby County v. Shelby County, et al*, 246 Ala. 192, 20 So. 2d 36, wherein the court said:

"* * * And we feel fully justified in reaching the conclusion that the U. S. bonds on deposit for the express purpose of their application to the old bond debt is properly to be considered as a credit thereon at this time.

"In substance and effect and from a practical standpoint, so far as Sec. 224 of our Constitution is concerned, it seems clear that such payment may now be considered as made, and the outstanding indebtedness thus reduced so far as the debt limit inhibition of the Constitution is concerned."

Thus it may be said, as a matter of law, that the principal of these bonds has already been retired, and that the only remaining charge, so far as said bonds are concerned, against the proceeds of the special tax levied for the payment of the interest on and principal of said bonds is the annual interest payments from now until 1951.

As stated hereinabove, it appears from the order of the court, setting aside the proceeds of this tax for the payment of the interest on and principal of these bonds, that the only pledge of the proceeds to that end was a pledge of so much of the proceeds of such tax each year as was necessary to pay the interest due during that year and a proportionate part of the principal thereof. All of the principal thereof having now been paid, in legal effect, the only charge against the annual proceeds of the special tax now remaining is the interest due on said bonds during that year.

Consequently, I find no legal objection to the use by Dale County of the surplus arising from this special tax for other public building purposes, since public buildings is one of the purposes for which said tax may have been originally levied. Of course, the interest installments which become due each year will be a first charge against the proceeds of such special tax for that year.

As to your second inquiry, I call your attention to Title 12, Chapter 6, Sections 73-91, Code of Alabama 1940, which is generally referred to as the "County Financial Control Law." Under Section 78, *supra*, no warrant or order for the payment of money may be issued by the county

governing body until funds are available for its payment upon presentation to the treasurer or depository. There are some specific exceptions to this general prohibition. For an opinion dealing with certain of these exceptions, you are referred to Quarterly Report of Attorney General, Vol. 10, page 176, which construes the original "County Financial Control Act." (The sections of said act dealt with in that opinion appear as Title 12, Sections 81, 85, and 90, respectively, Code of Alabama 1940). Nor does such section prohibit a county issuing warrants for highway construction purposes payable from the county's future allotment of State gasoline taxes (see *Isbell v. Shelby County*, 235 Ala. 571, 180 So. 567, and *Cochran v. Marshall County*, 242 Ala. 314, 6 So. 2d 489), or prohibit a county refunding warrants issued on or before May 1, 1943, for highway construction purposes, such refunding warrants to be payable from the county's future allotment of State gasoline taxes (see Act No. 308, General Acts 1943, page 279). It appears that none of these exceptions to this general prohibition authorize the issuance of interest bearing warrants to secure funds to pay for a proposed office building, and it is my opinion that Dale County could not issue interest bearing warrants against the anticipated surplus of this special tax for such purpose.

The opinion of this office appearing in Quarterly Report of Attorney General, Vol. 7, page 8, Biennial Report of Attorney General, 1936-38, page 169, which is in conflict with the conclusions reached herein, is hereby overruled, and the opinion appearing in Quarterly Report of Attorney General, Vol. 20, page 85, is hereby modified to conform to the conclusions reached herein.

However, your attention is invited to Section 85, *supra*, and Title 12, Chapter 9, Sections 124-128, Code of Alabama 1940, which deal with temporary loans in anticipation of the collection of taxes. Dale County could avail itself of these sections to secure funds with which to pay for a proposed office building, provided all of the provisions in regard to the making of temporary loans in anticipation of the collection of taxes are complied with.

Also, I refer you to Title 12, Chapter 7, Sections 92-109, Code of Alabama 1940, which deal with the issuance of bonds by a county. By following the provisions of this chapter, your county could issue bonds to secure funds to pay for the proposed office building (see Section 93, *supra*), pledging therefor the surplus of the special tax under consideration, provided the issuance of such bonds would not cause the county to exceed its constitutional debt limit, (see Constitution of Alabama 1901, Section 224). In determining the constitutional debt of the county, the \$150,000.00 of bonds here under consideration should not be included, since, in legal effect, they have already been retired. See *Taxpayers and Citizens of Shelby County v. Shelby County, et al, supra*.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 13, 1947.

Hon. W. Glenn Harrison,
State and County License Inspector,
Room 113, Court House,
Montgomery, Alabama.

Licenses—Under facts stated, representatives of the B. C. Armature Company who merely deliver merchandise in this State pursuant to orders for the same previously made outside the State are, not liable for any license under the licensing laws of the State of Alabama.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of November 4, 1947, is as follows:

"The B. C. Armature Company, an out-of-State concern, with no offices in the State of Alabama, is engaged in the business of rebuilding used or worn out armatures which it resells. The sales made by this company in the State of Alabama are to Western Auto Supply Stores located in this State, which stores are a part of a chain with headquarters in Kansas City, Missouri. This company takes orders for these rebuilt armatures at its home office from the home office of the Western Auto Supply Stores to be delivered to the various stores of this organization located in the State of Alabama. When a representative of this company leaves one of its warehouses or plants located outside of this State to make deliveries in Alabama, he knows exactly how many of these rebuilt armatures he is to deliver to each of the Western Auto Supply Stores located in this State, orders for the same having previously been given to the home office of Western Auto Supply Stores. He merely makes delivery of the number of rebuilt armatures which have been ordered previously by the home office of the Western Auto Supply Stores for its various stores in Alabama. However, when he makes a delivery of a particular number of these rebuilt armatures to a particular store according to such an order, he then picks up whatever number of used or worn out armatures that particular store might have on hand, and that store receives credit for the same from its home office, and the home office, in turn, receives credit from the B. C. Armature Company for the number of used or worn out armatures so picked up. As I have stated, all orders for these rebuilt armatures are given to the home office of the B. C. Armature Company by the home office of the Western Auto Supply Stores, and payment for the same is made by the home office of the Western Auto Supply Stores to the home office of the B. C. Armature Company. No sales are consummated by representatives of this company in Alabama, and the Western Auto Supply Stores in Alabama only receive credit for the used or worn out armatures which are

picked up from them by representatives of the B. C. Armature Company in the manner outlined above.

"As License Inspector of Montgomery County, I respectfully request your official opinion as to whether or not representatives of the B. C. Armature Company, engaged in business in the manner outlined above, are liable for a peddlers license or any other license under the licensing laws of the State of Alabama."

It is my opinion, under the facts as stated in your request, that the representatives of the B. C. Armature Company are not liable for any license under the licensing laws of the State of Alabama.

It is my further opinion, also based on these facts, that any license imposed on the representatives of this company by the State would be unconstitutional as an attempt to regulate interstate commerce. *Ex Parte Murray*, 93 Ala. 78; *State v. Agee*, 83 Ala. 110.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

November 14, 1947.

Hon. Travis H. Johnson,
Treasurer,
Walker County,
Jasper, Alabama.

Counties—Elections—Officers—Constitutionality.

County officers and employees, not candidates for nomination or election, are not prohibited from serving as election officials appointed under Title 17, Section 120, Code of Alabama 1940. Such election officials do not hold "offices or profit," nor are they "officers," within the purview of Constitution of Alabama 1901, Sections 68, 280 and 281 and Title 41, Section 5, Code of Alabama 1940.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion, bearing date of August 27, 1947, is as follows:

"Can elected County officers, office clerks or deputy sheriffs, whose salaries are paid by the County, out of the General fund, serve as either a clerk, a manager, or a returning officer in an election and draw the compensation allowed for such service while they

are regular employees of the county and drawing a salary from the county by reason of their regular employment?"

I am of the opinion that your question should be answered in the affirmative, subject to the qualifications that no candidate for election may serve as an election official.

In a previous opinion this office has held that the only prerequisite to appointment as a returning officer under Title 17, Section 120, Code of Alabama 1940 is that the appointee be a qualified elector.—Quarterly Report of Attorney General, Vol. 19, page 5. In a later opinion it was held that the holding of the above opinion was equally applicable to all the election officials appointed under Title 17, Section 120, *supra*. However, it was pointed out that one who is a candidate for nomination or election is disqualified, by reason of such candidacy, to serve as an election official in an election.—Quarterly Report of Attorney General, Vol. 19, page 97. Title 37, Section 331, Code of Alabama 1940 is not here applicable, as said section applies only to municipal officers and employees in municipal elections.

I know of no constitutional or statutory prohibition against an elected county officer, office clerk, deputy sheriff, or other county employee generally, not a candidate for nomination or election, serving as such an election official.—Constitution of Alabama 1901, Sections 68, 280 and 281, and Title 41, Section 5, Code of Alabama 1940, have no application for the reason that, in my opinion, such an election official does not hold an "office of profit," nor is he an "officer," within the purview of said constitutional and statutory provisions.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

November 14, 1947.

Dr. A. R. Meadows,
Superintendent of Education,
State of Alabama,
Montgomery 4, Alabama.

Taxation—Exemptions—Schools—City Boards of Education—

Property owned by the Birmingham City Board of Education is exempt from taxation under Constitution of Alabama 1901, Section 91, regardless of the use of the property.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of July 9, 1947, is as follows:

"At the request of Dr. L. Frazer Banks, Superintendent of the Birmingham City Schools, I am asking your opinion on a question submitted by him.

"The Birmingham City Board of Education recently purchased property to be used for school purposes. Due to delay in getting the buildings constructed and because of housing shortage, the Board has been collecting rent temporarily from this property, as it was deemed wise to let the house remain occupied until the buildings were needed for temporary classrooms or the grounds for construction. Is the Birmingham City Board of Education liable for taxes on the property which is rented?"

In my opinion, your question should be answered in the negative. This property is exempt from taxation under Constitution of Alabama 1901, Section 91, which provides as follows:

"The legislature shall not tax the property, real or personal, of the state, counties, or other municipal corporations, or cemeteries; nor lots in incorporated cities and towns, or within one mile of any city or town to the extent of one acre, nor lots one mile or more distant from such cities or towns to the extent of five acres, with the buildings thereon, when same are used exclusively for religious worship, for schools, or for purposes purely charitable."

In determining an exemption under the first part of Section 91, *supra*, ownership is the criterion and not the use.

Our Supreme Court has held that county boards of education are quasi corporations and are independent agencies of the State. *Kimmons v. Jefferson County Board of Education*, 204 Ala. 384, 85 So. 774; *Turk v. Board of Education of Monroe County*, 222 Ala. 177, 131 So. 436; *Garner v. McCall*, 235 Ala. 187, 178 So. 210; *Hawkins v. State Board of Adjustment*, 242 Ala. 547, 7 So. 2d 775. Similarly, city boards of education are quasi corporations and independent agencies of the State. *City Board of Education of Athens v. Williams*, 231 Ala. 137, 163 So. 802.

The opinions of this office are to like effect. See Quarterly Report of Attorney General, Vol. 13, page 109, holding that the Board of Education of Montgomery County is an instrumentality of the State and is not subject to taxation; and Quarterly Report of Attorney General, Vol. 8, page 263, holding that a city board of education is an independent agency of the State for the purpose for which it was created, the only material difference between a city and county board of education being the territorial extent of their respective jurisdictions.

A letter to you from this office, under date of August 25, 1947, is hereby withdrawn.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

November 17, 1947.

Hon. Edward A. Ling,
Chairman, Democratic Executive Committee,
City of Bessemer,
Bessemer, Alabama.

Municipalities — Officers — Elections — Democratic Executive Committees—Governor.

1. When a municipality changes to the commission form of government under Title 37, Chapter 4, Article 1, Code of Alabama 1940, such election has no effect on terms of members of the municipal Democratic executive committee.

2. Members of municipal Democratic executive committee are selected and hold office under rules established by governing body of Democratic party.

3. If municipality, by election, changes from commission form to aldermanic form of government, new mayor and aldermen must be appointed by Governor, under provisions of Title 37, Section 126, Code of Alabama 1940.

4. The Governor is not authorized to yield his appointive power under Title 37, Section 126, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of October 17, 1947, is as follows:

"On October 31, 1946, the City of Bessemer voted to change to the Commission Form of government under Article 1, Chapter 4, Title 37, 1940 Code of Alabama.

"The election was held January 14 and 21, 1947, and Bessemer is now operating under the Commission form of government.

"Bessemer's last general election under the Aldermanic form of government was held on September 18, 1944. In that election ten men, two from each of the five wards, were elected to the Bessemer Democratic Executive Committee and I was elected as Chairman.

"There is a movement now under way to hold another election to change the City's form of government back to the Aldermanic. The Probate Judge of Jefferson County has certified this election and ordered the Commission to call the election within the 40 day period.

"The sponsors of the new change have called on me, as Chairman of the Committee, for the Committee to hold a primary in the event the change is voted in.

"In my capacity as Chairman of the Bessemer Democratic Executive Committee will you kindly give me your opinion on the following questions, viz:

"1. What legal effect did the election, held by the City of Bessemer on October 31, 1946 to change to the Commission form of government under Article 1, Chapter 4, Title 37, 1940 Code of Alabama, have on the City's then existing Democratic Executive Committee?

"2. Did this Democratic Executive Committee go out of office with the Mayor, Alderman, etc. when Bessemer voted to change to the Commission form of government?

"3. Is the City of Bessemer now without a Democratic Executive Committee? If not, how long will this Committee continue to hold office?

"4. In the event the City of Bessemer votes to change back to the Aldermanic form of government can the Executive Committee hold a primary in the face of Title 37, Section 126, 1940 Code of Alabama?

"5. In the event the Governor of Alabama would be willing to yield his appointive power under Title 37, Section 126, 1940 Code of Alabama, to the extent of appointing those persons to office who won the nominations under a primary, would there then be any legal right for the Democratic Executive Committee to hold such a primary?

"6. If question number 5 is answered in the affirmative, would the Committee be justified in using its funds to finance such a primary or would there be any liability on the City of Bessemer to finance such a primary?"

Answering your inquiries in the order in which they appear in your inquiry, you are advised as follows:

1. The election held in the city of Bessemer on October 31, 1946, to change to the commission form of government under Title 37, Chapter 4, Article 1, Code of Alabama 1940, had no effect on the existing Bessemer Democratic Executive Committee. Such election only had the effect of removing the mayor and aldermen, and had no effect on other offices.

2. Your question No. 2 is answered by my answer to question No. 1, above.

3. From the facts stated in your inquiry, the city of Bessemer has the same Democratic Executive Committee as that elected in 1944. Municipal party committees are established in the manner provided for by the governing body of each party. Title 17, Section 341, Code of Alabama 1940. The Democratic Executive Committee for the city of Bessemer should be elected or selected and should hold office according to the rules prescribed by the governing body of the Democratic party. Section 341, *supra*. The Bessemer Democratic Executive Committee will therefore hold office under the rules and regulations prescribed by the State Democratic Executive Committee.

4. In the event that the city of Bessemer votes to change back to the aldermanic form of government, the Bessemer Democratic Executive Committee is not authorized to hold a primary to select a mayor and alderman for the reason that Title 37, Section 126, Code of Alabama 1940, expressly provides that the Governor shall appoint a mayor and the requisite number of aldermen. See also opinion to Hon. Joe T. Lewis, President, Board of Commissioners, Bessemer, Alabama, under date of October 8, 1947.

5. You are advised that the Governor is not authorized to yield his appointive power under the provisions of Title 37, Section 126, Code of Alabama 1940. It is his duty to make the initial appointments, and this may not be delegated to any other person or group of persons. See opinion under date of October 8, 1947, *supra*.

My answers to questions No. 4 and No. 5 make it unnecessary to answer your question No. 6.

I enclose a copy of the opinion referred to.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

November 26, 1947.

Hon. G. H. Howard,
Probate Judge of Elmore County,
Wetumpka, Alabama.

Counties—Courts of County Commissioners—Sheriffs—Boat, Motor and Grapnel—Title 15, Section 398, Code of Alabama 1940—Title 54, Section 5, Code of Alabama 1940.

1. County may furnish the sheriff with a boat, out-board motor, and grapnel for his use in the recovery of drowned bodies in "ferreting out crime."

2. Opinion found in Quarterly Report of Attorney General, Vol. 16, p. 128 overruled and withdrawn.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request for an official opinion bearing date of April 15, 1947, is as follows:

"Please advise me on the following questions.

"Can the County legally purchase a grapnel and other accessories to be used by the Sheriff in making investigations and locating the bodies of drowned persons.

"Can the County purchase a Motor and Boat for the Sheriff to be used for the purposes stated above.

"Your usual prompt attention will be greatly appreciated."

I am of the opinion that each of your questions should be answered in the affirmative.

Wetumpka, the county seat of Elmore County, is located on the Coosa River, which flows through that county for several miles. The eastern boundary of that county is formed by the Tallapoosa River; the southern boundary by the Tallapoosa and Alabama Rivers. Lake Jordan, a recreational area, is located in Elmore County. Under the circumstances I assume that the Sheriff of Elmore County, at certain intervals, has occasion to remove from these waters bodies of drowned persons. A grapnel is a grappling iron or grab, with flukes or claws, used for that purpose in conjunction with a boat and out-board motor.

Under Title 15, Section 398, Code of Alabama 1940, the sheriff is the chief law-enforcement officer of his county. Under Title 54, Section 5, Code of Alabama 1940, it is his duty:

" . . . to ferret out crime, to apprehend and arrest criminals, and in so far as within their power to secure evidence of crimes in their counties, and to present a report of the evidence so secured to the solicitor or deputy solicitor for the county,"

I construe the duty "to ferret out crime" to mean what the word implies, namely, to drive or hunt out of a lurking place, as a ferret does the rabbit. Hence, I construe it to mean "to search about." It is not possible for the State to prove a homicide without first proving the *corpus delicti*. Hence a "searching about for the body" is the sheriff's first duty. No successful search and recovery can be made in deep waters without the aid of a boat, motor, and grapnel. In counties having rivers and large lakes it frequently is not possible "to ferret out crime" without the aid of a boat.

Since this duty is imposed upon the Sheriff by law, it follows that the county may make reasonable expenditures in connection therewith. In other words, such expenditures, although not directly authorized, would be proper by necessary implication. *Ensley Motor Car Company v. O'Rear*, *Treas.*, 196 Ala. 481, 71 So. 704. *CF. Yielding v. Ball, et al*, 205 Ala. 376, 87 So. 785.

This opinion conforms to a previous ruling by this office that a county has authority to furnish the sheriff with machine guns, gas guns and ammunition. *Biennial Report of Attorney General*, 1936-38, p. 535. A county may also furnish the sheriff with radio equipment. *Opinion to Hon. John T. Frazer, Judge of Probate, Lee County, under date of February 12, 1947.*

A contrary conclusion was reached in an opinion of this office found in *Quarterly Report of Attorney General*, Vol. 16, p. 128, in which it was held that a county is without authority to furnish the sheriff with a motor boat. This opinion is hereby expressly overruled and withdrawn.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

November 28, 1947.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Licenses—Auctioneers—

Title 51, Section 461, Code of Alabama 1940.

An auctioneer coming from without the State and selling by auction in only one county of the State of Alabama is not a transient or itinerate auctioneer within the meaning of Title 51, Section 461, Code of Alabama 1940, and is therefore not liable for a transient or itinerate auctioneer license.

Opinion by Assistant Attorney General Brooks.

Dear Sir:

Your request for an official opinion, bearing date of November 22, 1947, is as follows:

"Please give me your opinion on the following question: dealing with auctioneer's license under Section 461, Title 51.

"A Mr. Clark who resides in Moultrie, Georgia, comes to Eufaula Stockyards Tuesday of each week, and is auctioneer for said stock-

yards, this being the only place in Alabama in which he does this kind of work. I am anxious to know whether or not he is classed as a Transient Auctioneer. I am of the opinion that he is not, and that he would be entitled to the Auctioneer's license other than the Transient License. Thanking you to please give me this opinion, I remain,"

Title 51, Section 461, Code of Alabama 1940, which levies a license on auctioneers reads, in part, as follows:

"§ 461. * * * * * Each transient or itinerant auctioneer shall pay one state license of fifty dollars, and in addition a county license of twenty-five dollars in each county where he sells by auction.

* * * * *

A transient or itinerant auctioneer, as the term is used in the code section referred to above, is one who sells at auction in two or more counties of this State.

Since the auctioneer under consideration sells by auction in only one county of this State, I am of the opinion that he is not a transient or itinerant auctioneer and is, therefore, not liable for a transient or itinerant auctioneer license.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 2, 1947.

Hon. Frank O. Deese,
Judge of Probate,
Dale County,
Ozark, Alabama.

Hospitals—Counties—Courts of County Commissioners.

1. County hospital is a public building within the provisions of Constitution of Alabama 1901, Section 215.

2. The proceeds of the special tax of one-fourth of one per centum levied by Dale County under the provisions of Constitution of Alabama 1901, Section 215, not heretofore otherwise pledged, may be used for the purpose of defraying a part of the cost of erecting a county hospital under the provisions of the Hill-Burton Act.

3. No part of the proceeds of such special tax may be used for the maintenance of such hospital.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of November 22, 1947, is as follows:

"I desire your further opinion in connection with your recent opinion as to whether Dale County may use its surplus funds from its $2\frac{1}{2}$ mill tax which was originally levied under Title 12, Section 186, Code of Alabama 1940 for purposes of County Hospital construction under the provisions of the Hill-Burton Act.

"The Court desires to use a portion of this surplus, and of the entire tax when it is fully released in 1951, for the purpose of a bond issue to provide funds for the County's part of the County-State-Federal matching for the construction of a county hospital under the provisions of the said act, if this may legally be done.

"What I wish to know is whether such a hospital comes under the head of County Buildings as described in Title 12, Section 186, Code of Alabama 1940.

"Also, if such tax may be used for construction of such a hospital, may any part of this special tax be used in its maintenance?

"This information is urgent and I will thank you for your usual prompt attention to this matter."

In answer to your first question, it is my opinion that a county hospital constructed under the provisions of the Hill-Burton Act will be a public building within the provisions of Constitution of Alabama 1901, Section 215, which provides as follows:

"§ 215. No county in this state shall be authorized to levy a greater rate of taxation in any one year on the value of the taxable property therein than one-half of one per centum; provided, that to pay debts existing on the sixth day of December, eighteen hundred and seventy-five, an additional rate of one-fourth of one per centum may be levied and collected which shall be appropriated exclusively to the payment of such debts and the interest thereon; provided, further, that to pay any debt or liability now existing against any county, incurred for the erection, construction, or maintenance of the necessary public buildings or bridges, or that may hereafter be created for the erection of necessary public buildings, bridges, or roads, (a) any county may levy and collect such special taxes, not to exceed one-fourth of one per centum, as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied and collected."

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In 50 Corpus Juris, page 850 et seq., we find the following:

"Public buildings. In a narrow sense a 'public building' is a building erected and owned by state, county or municipal authorities; a building owned or controlled and held by the public authorities for public use; a building belonging to, or used by, the public for the transaction of public or quasi-public business. As so defined the term 'public building' includes a high school building, a hospital, a jail, a town calaboose, or a common schoolhouse."

In the case of *Battle et al. v. Willcox et al.*, 122 S. E. 516, the Supreme Court of South Carolina said:

"Appellants' second contention is that the act is in contravention of section 6, art. 10, of the Constitution, in that the hospital building in question is not such a public building as is contemplated by that section, and hence that the Legislature had no authority to empower the township to issue bonds for that purpose. The constitutional provision here invoked is a limitation upon the power of the General Assembly 'to authorize any county or township to levy a tax or issue bond for any purpose except for educational purposes, to build and repair public roads, buildings, and bridges,' etc. The learned circuit judge held that the term 'public buildings,' within the purview of this section of the Constitution, 'should be taken to include such buildings as may be fairly deemed to promote a public purpose,' citing in support of that conclusion the California case of *Yolo v. Barney*, 79 Cal. 375, 21 Pac. 833, 12 Am. St. Rep. 152, in which 'a hospital is specifically designated as a public building.' If, as we have concluded in the consideration of appellants' first contention, the erection and maintenance of a hospital may be lawfully undertaken by the township as a governmental function, under a plenary grant of power from the General Assembly, it would seem clear that the building essential to the discharge of that function would be, as the circuit judge correctly held, a public building in the sense that it would promote a public purpose or subserve a public use. * * * * *

It follows that Dale County may use the surplus of the proceeds of the special tax of one-fourth of one per centum levied by the county under the provisions of Constitution of Alabama 1901, Section 215, referred to in the opinion to you under date of November 13, 1947, and the entire proceeds of said special tax after 1951, for the purpose of defraying a part of the cost of erection of a county hospital under the provisions of the Hill-Burton Act. There is no doubt about the authority of a county to erect a public hospital. See Title 22, Section 189, Code of Alabama 1940, and Act No. 211, General Acts 1945, page 330.

In answer to your second question, it is my opinion that no part of the surplus may be used for the maintenance of the hospital. Constitution of Alabama 1901, Section 215, *supra*, does not provide that the proceeds of the tax may be used for the maintenance of public buildings

that are to be erected in the future, but limits the use to the erection of public buildings. The omission from that section of the words "or maintenance" in regard to future debts, cannot be regarded as devoid of some significance. *Commonwealth v. Hayden*, 97 N. E. 783.

While Title 12, Section 186, Code of Alabama 1940, referred to in your inquiry, is the statutory provision implementing Section 215, *supra*, and includes the words "or maintenance," such statutory provision cannot enlarge upon this constitutional provision.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 12, 1947.

Honorable Ralph B. Draughon,
Acting President,
Alabama Polytechnic Institute,
Auburn, Alabama.

Alabama Polytechnic Institute—Board of Trustees.

Constitution of Alabama 1901, Section 94; Constitution of Alabama 1901, Section 266; Title 52, Section 477, Code of Alabama 1940.

1. There is no constitutional inhibition against the Board of Trustees of the Alabama Polytechnic Institute terminating a contract of employment with an instructor of such institution at the mutual consent of the parties thereto, and as a condition of such termination paying to said instructor a sum not in excess of the amount he would have received had he served out the remainder of the time contemplated by the contract.

2. Under the power and authority granted the Board of Trustees by the Constitution and statutes of the State such Board may, if in their judgment the best interest of the institution will thereby be served, terminate, upon the mutual consent of the parties thereto, a contract of employment existing between such institution and an instructor thereof, conditioning such termination upon the payment to such instructor of a sum not in excess of the amount he would have received had he served out the remainder of the time contemplated in the contract.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of December 6, 1947, is as follows:

"Please examine the attached copy of a contract existing between the Alabama Polytechnic Institute and Coach Carl M. Voyles, and give me your opinion as to whether the Alabama Polytechnic Institute may legally terminate this contract by the payment of a sum of money not in excess of the amount he would receive if he should serve out the remainder of the time contemplated in the contract.

"Your opinion in this matter will be deeply appreciated.

"It is assumed, of course, that the above payment would be made as the result of the mutual agreement of the parties to the contract."

It is my opinion that the contract referred to by you in your inquiry may be terminated by the mutual consent of the parties thereto and that the Alabama Polytechnic Institute may legally pay to Coach Voyles a sum of money not in excess of the amount he would receive if he should serve out the remainder of the time contemplated in the contract as a condition of such termination.

The contract now existing between the Alabama Polytechnic Institute and Coach Carl M. Voyles, a copy of which is attached to your request for an opinion, shows that the Alabama Polytechnic Institute entered into a contract of employment with Coach Voyles for a six (6) year period commencing April 15, 1944, further stipulating that Coach Voyles was to receive compensation at the rate of \$10,000 per year for said period of time. This contract also contains a termination clause providing, in full, as follows:

"This agreement may be terminated at any time short of the period of six (6) years by the mutual consent of both parties hereto, and in the event of such termination, in the manner aforesaid, the compensation for the unexpired portion of the six years period shall be considered, and agreed upon as part of the mutual agreement for termination."

Your inquiry presents two questions for consideration, the first being the question of whether or not there is any constitutional inhibition against the method of termination set out in your inquiry. If it be held that no such constitutional prohibition does exist, the question naturally arises as to whether the Board of Trustees of Alabama Polytechnic Institute is vested with the authority to so terminate such contract.

If there be any constitutional inhibition against such a transaction it is to be found within Section 94 of the Constitution of Alabama 1901. Said section is as follows:

"The legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder

in any such corporation, association, or company, by issuing bonds or otherwise."

This section has, on several occasions, been the subject of comprehensive discussions by the Supreme Court of Alabama, particularly as to the purpose and meaning of such provision. In the case of *Garland v. Board of Revenue*, 87 Ala. 223, 6 So. 402, it was stated that such a provision was incorporated into the constitutional provisions of the state for the reason that several counties had subscribed for stock in railroad corporations, issued bonds for that purpose, from which disastrous consequences ensued. It was there said that the provision was mainly to prevent a recurrence of such consequences, but that its terms were comprehensive enough to exclude any aid to private enterprises. A pertinent excerpt from such decision is as follows:

"With a view to comprehend the scope of the inhibitory provision of the Constitution under consideration, and to ascertain the purpose of its introduction, the causes in which it originated, and the mischiefs designed to be remedied, may be properly and helpfully considered. Under the constitutions preceding the present, the legislature had unlimited power over the subject. Several of the counties had, by legislative authority, subscribed for stock in railroad corporations, and issued bonds to pay for the same, in anticipation of their future public benefit. The disastrous consequences which ensued are common knowledge. Either from mismanagement or fraud, insolvency of the companies, and failure to complete the roads, supervened, the stock became worthless, and the indebtedness exceeded the ability of the counties to pay. Expensive and protracted litigation was inaugurated; taxation became oppressive; legal proceedings to compel the levy of taxes were prosecuted by the bondholders; confiscation of the property of the citizens was impending, and the counties reduced to such condition as to be designated 'the Strangled Counties.' To prevent a recurrence of such ruinous consequences to the governmental agencies, which had either transpired, or were clearly apparent at the time of the formation of the present constitution, the inhibitory provision was introduced. Its terms are comprehensive enough to include any aid, by issuing bonds or otherwise, by which a pecuniary liability is incurred, furnished by the municipalities named to private enterprises.
* * * * *

It has also been held by the Court that said provision includes within its prohibition a direct loan or grant to an individual. *Griffin v. Jeffers*, 221 Ala. 649, 130 So. 190; *Stone v. State*, 223 Ala. 429, 136 So. 727.

In the more recent case of *Board of Revenue and Road Commissioners of Mobile County, et al. v. Puckett*, 227 Ala. 374, 149 So. 850, the Supreme Court again had occasion to consider the provisions of Section 94, *supra*, and there made certain observations considered highly pertinent to the question here under consideration and for that reason certain pertinent portions of said opinion are here set out at length.

"In the case of *State of Wyoming v. Carter*, supra, some observations were made which seem to us to be sound and pertinent in this case. It is there conceded, whether the Constitution so expressly provides or not, that an appropriation of public revenues must be for a public purpose. It is there said that an appropriation to pay a just claim against the state is necessarily for a public purpose. That 'in a sense, of course, every payment not legally enforceable might be said to be a gift. But courts have not, generally, construed that term as broadly as that.' On the other hand, it is there said to be 'a claim which a state may recognize, it need not be such as is legally enforceable, but may be a moral claim, one based on equity and justice.' It quotes from *U. S. v. Realty Co.*, 163 U. S. 427, 16 S. Ct. 1120, 41 L. Ed. 215, construing constitutional authority of Congress to pay 'debts' of the United States, as follows: 'The term "debts" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law.'"
(Emphasis supplied).

Your inquiry present no question concerning the propriety of a termination of such contract without payment to Coach Voyles for the unexpired portion of such contract, and in view of the above decision it is not necessary that it be determined whether, in the event of such a termination, Coach Voyles might have a claim enforceable in the courts of the State. Suffice it to say, that in view of the existing contract, Coach Voyles would have, at the least, a moral claim based on equity and justice, that is a claim such as is binding on the conscience or the honor of an individual, even though such claim might possibly obtain no recognition in a court of law.

It is, therefore, my opinion that there is no constitutional prohibition against a termination of the now existing contract with Coach Voyles, at the mutual consent of the parties thereto, conditioned upon the payment to Coach Voyles of an amount not in excess of that which he would receive should he serve out the remaining period of time contemplated by the terms of the contract.

Next considered is the question concerning the authority of the Board of Trustees of the Alabama Polytechnic Institute to so terminate such contract in the above manner.

Section 266, Constitution of Alabama 1901, establishes the Board of Trustees for such institution prescribing their method of appointment and the duties and powers of those so appointed. Said section is as follows:

"The Alabama Polytechnic Institute, formerly called the Agricultural and Mechanical College, shall be under the management and

control of a board of trustees, which shall consist of two members from the congressional district in which the institute is located, and one from each of the other congressional districts in the state, the state superintendent of education, and the governor, who shall be ex officio president of the board. The trustees shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold office for a term of twelve years, and until their successors shall be appointed and qualified. The board shall be divided into three classes, as nearly equal as may be, so that one-third may be chosen quadrennially. Vacancies occurring in the office of trustees from death or resignation, and the vacancies regularly occurring in the year nineteen hundred and five shall be filled by the governor, and such appointee shall hold office until the next meeting of the legislature. Successors to those trustees whose terms expire in nineteen hundred and three shall hold office until nineteen hundred and eleven; successors to those whose terms expire in nineteen hundred and five shall hold office until nineteen hundred and fifteen; and successors to those whose terms expire in nineteen hundred and seven shall hold office until nineteen hundred and nineteen. No trustee shall receive any pay or emolument other than his actual expenses incurred in the discharge of his duties as such."

It has been held by former opinions of this office that this section vests in the Board of Trustees absolute financial control of the institution. That said Board of Trustees have exclusive management of the financial and other interests of the Institute, which cannot be interfered with by the Legislature. Biennial Report of Attorney General 1918-20, p. 445; Biennial Report of Attorney General 1918-20, p. 474.

This latter opinion makes the following observations:

"It has been held that the power vested in the trustees by the Constitution gives the trustees the exclusive management and control of the Institute, and that solely to their judgment and discretion is committed the supervision of the financial and other interests of the Institute; that this control cannot be interfered with even by the Legislature of the State, as the trustees derive their power from the same source as the Legislature—the State Constitution. It follows that when funds become the unconditional property of the Alabama Polytechnic Institute, they cannot be legally spent except by the direction of its trustees."

Title 52, Section 477, Code of Alabama 1940, in further prescribing the powers and authority of the Board of Trustees, provides as follows:

"The board of trustees have the power to organize the institute by appointing a corp of instructors, who shall be styled the faculty of the institute and such other instructors and officers as the interest of the institute may require; and to remove any such instructors or other officers, and to fix their salaries or compensation, and increase or reduce the same at their discretion, to regulate, alter,

or modify the government of the institute as they may deem advisable; to prescribe courses of instruction, rates of tuition, and fees; to confer such academic and honorary degrees as are usually conferred by institutions of similar character; and to do whatever else they may deem best for promoting the interest of the institute. They shall also establish and maintain a military department in the institute, and elect a commandant and such other officers as may be necessary for the department." (Emphasis supplied).

In view of the above enumerated powers and authority of the Board of Trustees, it is my opinion that, no constitutional inhibition existing to prohibit such a transaction, the Board of Trustees may, if in their judgment the best interest of the institution would thereby be served, terminate the contract now existing between the Alabama Polytechnic Institute and Coach Carl M. Voyles at the mutual consent of the parties thereto, and as a condition of such termination pay to Coach Voyles a sum not in excess of the amount he would receive should he serve out the remainder of the time contemplated by the contract.

Such a holding is in harmony with former opinions of this office, particularly that opinion found in Biennial Report of Attorney General 1920-22, page 317, wherein it was held that under the broad powers vested in the Board of Trustees of such institution, such Board was authorized to pay to the widow of a deceased president of the institution the salary which would have accrued to such deceased person during the remainder of the fiscal year.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 12, 1947.

Hon. L. B. Stephens,
Administrative Assistant,
Board of Pardons and Paroles,
State of Alabama,
CAPITOL.

Pardon—Parole and Probation—Fines

When a person has been convicted of a criminal offense and has been assessed a fine and fails to pay or confess judgment for the fine, and is sentenced to hard labor in lieu thereof, the State Board of Pardons and Paroles has authority to remit such fine under Title 42, Section 16, Code of Alabama 1940, although it has been reduced to a hard labor sentence.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for an official opinion, bearing date of November 17, 1947, is as follows:

"The State Board of Pardons and Paroles requests your official opinion on the following question:

"When a person has been convicted of a criminal offense and has been assessed a fine and fails to pay or confess judgment for the fine and is sentenced to hard labor in lieu thereof, does the State Board of Pardons and Paroles have authority to remit such fine after it has been reduced to a hard labor sentence?

"The reason for this request is that there is now pending such a matter before the Board."

I am of the opinion that your inquiry should be answered in the affirmative.

Title 42, Section 16, Code of Alabama 1940, provides as follows:

"§ 16. When board may grant pardons, remit fines and forfeitures; procedure.—In all cases except treason and impeachment, and except in cases in which sentence of death is imposed and not commuted, as is provided by law, the board shall have the authority and power, after conviction and not otherwise, to grant pardons and to remit fines and forfeitures. It shall cause to be entered in a book kept for that purpose the reasons in each case, and must preserve on file all documents on which it acted in the remission of fines and forfeitures and the granting of pardons. No pardon shall relieve from civil and political disabilities unless specifically expressed in the pardon."

Under the above-quoted section, the State Board of Pardons and Paroles has the authority to remit fines and forfeiture, with certain exceptions.

Fines and costs may be paid after sentence is imposed for failure to pay the same or judgment confessed therefor, credit being allowed on the cost according to the number of days served, but no credit is allowed on the fine. A fine cannot be accepted in lieu of an additional hard labor sentence.—Biennial Report of Attorney General, 1930-32, page 60, and authorities cited therein. If the fine may be paid after a sentence is imposed for failure to pay the same, I know of no reason why said fine cannot be remitted under the authority of Section 16, supra.—Cf. Quarterly Report of Attorney General, Vol. 15, page 63.

It must be borne in mind that the Board has no authority to remit costs, nor has it authority to make a refund of fines heretofore having

been paid.—Quarterly Report of Attorney General, Vol. 28, page 88; Quarterly Report of Attorney General, Vol. 31, page 10.

When a fine is remitted, the vitality of the judgment, except as to costs, is ipso facto destroyed.—*Chisholm v. State*, 42 Ala. 527. See also, *Dane v. Loomis*, 51 Ala. 487. But a release from imprisonment alone is not a release or satisfaction of the fine.—*State v. Richardson*, 18 Ala. 109.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 17, 1947.

Hon. Fred Posey,
Circuit Clerk,
Autauga County,
Prattville, Alabama.

Appearance Bond—Forfeiture—Sureties—Costs in forfeiture case—Opinions Extended, Biennial Report of Attorney General, 1936-38, p. 141—Bail—Title 15, Section 212, Code of Alabama 1940; Title 15, Sections 213, 214, 218, also Title 11, Sections 83, 65, Code of Alabama 1940.

Surety on forfeited bail or appearance bond liable only for
(1) amount of bond and (2) costs attending forfeiture.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of January 22, 1947, is as follows:

“On December 11th, 1946, I asked for an official opinion which I respectfully ask that you withdraw and substitute this request in its place.

“Please give an official opinion on the following:

“When a person signs an appearance bond, as surety, for a prisoner's appearance in Circuit Court or County Court, as the case may be, or an appeal bond to the Court of Appeals of the State of Alabama, and the bond is forfeited because the prisoner failed to make his appearance, at the proper time, what is the person who signed the bond as surety obligated to pay. Is he obligated to pay the bond as forfeited by the Court, plus the Court cost, or only the amount of the Court cost.

"For example: Two people signed a bond, as sureties, on an appeal bond, to the Court of Appeals of Alabama. Soon after the prisoner was released from jail, he skipped bond. After the Court of Appeals upheld the decision of this Circuit Court, the Court forfeited the appeal bond in the full amount. Were the people who signed the appeal bond as sureties liable for the amount of the bond plus the Court costs?

"In the event you hold that the sureties are not liable for more than the amount of the bond as forfeited, then against whom are the costs taxed."

You request an opinion on the following question: When a person signs an appearance bond as surety for a defendant in a criminal case in a circuit court or a county court, or an appearance bond (appeal bond) to the Court of Appeals and the prisoner skips bond and fails to appear, what is the surety obligated to pay on forfeiture, (a) the court costs (court costs attending the forfeiture proceedings), or (b) merely the amount of the face of the bond?

A former opinion of this office, Biennial Report of Attorney General, 1936-38, p. 141, holds as follows: (1) Sureties on an appearance bond in a criminal case can only be made liable in case of a forfeiture for (a) the amount of the bond, and (b) the cost of the forfeiture.

It is my judgment that the conclusions reached in said opinion are correct, but that it should be extended.

The former opinion of this office does not refer in any way to the other costs incurred by the defendant in the criminal case for which the appearance bond is made. The former opinion relates to the costs attending the forfeiture proceedings alone. The case of *Ex Parte City of Russellville Re Gladney v. City of Russellville*, 19 So. 2d 601, holds that the surety on an appearance bond cannot be held liable for the costs accruing in the criminal case in the court below and on appeal. This case does not hold that sureties on a bail bond are not liable for the costs attending the forfeiture proceedings which is a separate case, civil in nature, wherein the State for the use of the county sues the principal and surety on the appearance bond.

When a person signs a bail bond or an appearance bond in the trial court or an appeal bond (which is nothing more than an appearance bond) in the appellate court, that persons signing the bond as surety undertakes to pay a certain sum of money in case the principal or defendant fails to appear in court at the time he should appear. Title 15, Section 212, Code of Alabama 1940. When the defendant or principal on the bond fails to appear in the trial court a conditional judgment is rendered against the principal and the sureties. Title 15, Section 213, Code of Alabama 1940. A notice of scire facias of the conditional judgment then issues to the principal and to the sureties. Title 15, Section 214, Code of Alabama 1940. This notice informs the principal and sureties that the

conditional judgment forfeituring the amount of the bond will be made absolute unless cause is shown why forfeiture should not be made absolute. When the scire facias issues, a new suit has begun, a civil suit, separate and apart from the criminal proceedings, wherein the State of Alabama for the use of the particular county is the plaintiff and the principal and the surety on the bond are the defendants. See *State, for use of Coosa County v. Parker*, 83 Ala. 269, 3 So. 552; *Dover v. State*, 45 Ala. 244; *Hatch v. State*, 40 Ala. 718; *Ex Parte Moore*, 12 So. 2d 77.

If the bond is forfeited in this civil suit, the principal and sureties being jointly and severally liable, are defendants in the civil suit, and the costs of forfeiture are taxed against the unsuccessful party as in other civil suits. *State, for use of Coosa County v. Parker*, 83 Ala. 269, 3 So. 552. In the *Parker Case*, the court said:

"A suit of this nature, on a forfeited undertaking of bail, has uniformly been held to be a civil suit, not a criminal action, . . . That is, it commences to be a civil action on the issue of the notice, or scire facias against obligors, which answers the place of a summons and complaint in an ordinary suit. . . . It is provided by statute 'that the successful party in all civil action is entitled to full costs, for which judgment must be rendered unless in cases otherwise directed by law;' . . ."

The opinion then continues and holds that Coosa County, being a party to the suit, and the unsuccessful party therein is liable for the payment of costs.

The *Parker case* is supported by a statute. Title 15, Section 218, Code of Alabama 1940. In connection with the assessment of costs in forfeiture bail cases, Title 15, Section 218, concludes, "And when a conditional judgment is set aside, no costs must be imposed on the defendant." Apparently the implication is that when the conditional judgment is not set aside, the costs are imposed upon the defendants in the forfeiture proceedings who are the surety and the principal. This implication is supported by other statutes. Title 11, Section 83, Code of Alabama 1940, provides as follows: "The fees specified in this article are to be collected and paid as follows: (a) Fees which accrue on a forfeiture against . . . bail must be taxed as costs and collected under execution unless excused therefrom by the court; . . ." Since forfeiture of bail proceeding is a civil case, and since costs must be taxed and collected as in other civil cases, it would appear that the costs in the forfeiture proceedings should be taxed according to this Title 11, Section 65, Code of Alabama 1940, requiring that in all civil actions the successful party is entitled to full costs for which judgment must be rendered.

There is no doubt in my mind, therefore, that in a forfeiture proceeding the surety who is a defendant in a forfeiture proceeding in a civil case may be taxed with the costs of a forfeiture proceeding. This is the holding of the former opinion of this office.

The case of *Ex Parte Tillery*, 114 So. 15, holds that on appeal execution for costs in the criminal case may be issued against the sureties on the appearance bond of the defendant for the reason that the defendant has not "abided the judgment of this court." This case is overruled by the *Russellville* case holding that the sureties on the appearance bond are not liable for the costs of prosecution in the criminal case, nor the fine in the criminal case, nor the costs of appeal in the intermediate court, nor the costs of appeal in the appellate court. All of these items have to do with costs in the criminal case and not the case in the separate civil forfeiture case.

We should perhaps here note that the costs in the criminal case would be collected under the applicable provisions of Title 11, Section 83, Code of Alabama 1940.

The sureties on an appearance bond, therefore, in my opinion, are liable only for (1) the amount of the bond, and (2) the costs attending the forfeiture proceedings.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 17, 1947.

Hon. Festus M. Shamblin,
Tax Assessor,
Tuscaloosa County,
Tuscaloosa, Alabama.

Taxation—Ad Valorem—Title 51, Section 21(d), Code of Alabama 1940.

1. A merchant who began business February 15, 1947 is liable for ad valorem tax on the capital actually employed in the business, but such tax should be apportioned as provided in Title 51, Section 21(d), Code of Alabama 1940.

2. (a) Anyone who brings property into the State of Alabama after October 1 and before the tax assessor has completed his assessment is liable for ad valorem tax thereon as though the same were held or owned by him on October 1, and said tax cannot be prorated.

(b) One who owns tangible personal property or real property in this State on October 1 is liable for the ad valorem taxes thereon for the current tax year, even though he might have sold same subsequent to October 1.

Opinion by Assistant Attorney General Tiller.

Dear Sir:

Your request for an official opinion, bearing date of April 22, 1947, is as follows:

"A Large Department store began operation in this town February 15, 1947. Are they liable for Ad valorem taxes for the year 1947?

"A Radio Station began their operations in this town in December 1946, which was after the beginning of the present Tax year (which began Oct. 1, 1946). Are they liable for 1947 Ad valorem Taxes?

"It is very important that I have your opinion on the above questions at your earliest convenience.

"Thanking you for your many past favors."

Answering your inquiry, we beg to advise as follows:

With respect to the liability vel non of the department store for ad valorem taxes for the year 1947, such store having begun business on February 15, 1947, it is my opinion that said department store will be liable for three-fourths of what would otherwise be the amount of the tax for the whole year.

The taxation of a stock of goods, wares, and merchandise, where the business began to operate after October 1 of the current tax year, comes within the exception to the general rule of law that October 1 is the law date of liability for ad valorem taxes. That such stock of goods as you refer to is liable for ad valorem taxation for a pro rata part of what would otherwise be the taxes for the tax year 1947, is amply demonstrated by Title 51, Section 21(d), Code of Alabama 1940, which reads as follows:

"(d) All stocks of goods, wares and merchandise, the assessment to be on the average amount on hand during the preceding year, except in cases where business is commenced on or after October 1 of a current year, and in such cases the assessment to be on the capital actually employed in the business and apportioned as hereinafter provided, but the amount so assessed for any whole year shall in no case be less than the capital actually employed in the business, and this shall include all goods, wares and merchandise kept on plantations or elsewhere, or by railroad companies or persons, for sale or to be dealt out to laborers or employees for profit, or on account of their wages, and shall include all goods, wares and merchandise offered for sale by any person commencing business subsequent to the first day of October of a current year, but in such

case the tax shall be apportioned according to the date at which the business was commenced, so that if commenced after the first day of January the tax shall be three-fourths of the tax for the whole year; if commenced after the first day of April the tax shall be one-half of the tax for the whole year; provided that the assessment herein provided for shall not include products raised on the farms in the hands of the original producers. If the person, association or corporation, receiver or trustee carrying on such business shall fail to make return of the amount of stock of goods, wares and merchandise as provided by law, or if the county tax assessor is not satisfied with the return made, in order to make proper assessment, he shall have the right to demand a copy of the last inventory made of such stock of goods, wares or merchandise, and may also by inquiry of persons believed to have knowledge of the subject obtain information as to the probable average amount of such stock, and from such information may assess the same upon his best judgment."

You will note from the above provision that where the business began after October 1, the basis of the assessment is the capital actually employed in the business, but apportioned according to the time said business began. In other words, the business in question having begun on February 15, 1947, "the tax shall be three-fourths of the tax for the whole year."

Therefore, it is my opinion that the stock of goods under consideration is subject to ad valorem taxation for the year 1947, apportioned as hereinabove stated.

In the second paragraph of your letter you also ask whether or not a radio station, which began operations in December 1946, was liable for ad valorem taxes for the tax year 1947. This question cannot be answered categorically, for the reason that the facts stated by you are not sufficient.

Assuming that the radio station referred to is a new station, and that the property now owned by it was brought into the State after October 1, 1946, and before the assessor had completed his assessment, it is my opinion that such property would be liable for ad valorem taxes for the current tax year.

As stated hereinabove, October 1 is ordinarily the law date of liability for ad valorem taxation. *United States v. Alabama*, 61 S. Ct. 1011, 313 U. S. 274; *Johnson v. State*, ex rel. *City of Birmingham*, 245 Ala. 499, 17 So. (2d) 662. However, an exception to this rule is provided in Title 51, Section 21(m), Code of Alabama 1940, which reads as follows:

"All property brought into the State after the first day of October and before the assessor has completed his assessment, shall be subject to taxation the same as if it had been held or owned in the State on the first day of October."

Therefore, it is apparent that the law date of such property for ad valorem taxation is the date the same is brought into the State, provided it is brought into the State within the dates specified. However, assuming that the radio station was here on October 1 and was in December, 1946, purchased by the present operators, then, in that event, the liability for ad valorem taxation for the current tax year 1947 would be on those who owned the station on October 1, 1946, and not upon those who, subsequent to the said date of October 1, might have purchased said station. See case of *United States v. Alabama*, supra, and *Johnson v. State ex rel City of Birmingham*, supra.

In the event the property owned by the radio station was brought into the State after October 1, 1946, and before the tax assessor completed his assessments for the current tax year, the owners would be liable for ad valorem taxation thereon for the full tax year as though the same had been owned by them in this State on October 1. In other words, there would be no proration by reason of the fact that it was not here on October 1. There is simply no provision in the law which provides for the proration of ad valorem taxation except in the case of a stock of goods, wares and merchandise. See *Magruder, C.I.R., v. Suplee*, 62 S. Ct. 1162, 316 U. S. 394.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 18, 1947.

Honorable Ralph P. Eagerton,
Chief Examiner of Accounts,
State Capitol,
Montgomery, Alabama.

Court of Common Pleas—Montgomery County—Clerks—Justices of the Peace—Sheriffs—Costs and Fees—Bail Bond—Sureties—Department of Corrections and Institutions.

1. The Department of Corrections and Institutions not liable for items of docketing cause, judgment, and final judgment, when defendant is convicted in the Court of Common Pleas of Montgomery County. Section 33 of Act No. 168, Local Acts 1939, page 87, approved March 15, 1939. Title 11, Section 96, Code of Alabama 1940. Title 45, Sections 69 and 96, Code of Alabama 1940.

2. The clerk of the Court of Common Pleas of Montgomery County is entitled to tax as costs the same fees and costs allowable to the justices of the peace. Act No. 168, Local Acts 1939, page 87, approved March 15, 1939.

3. If the clerk of a court erroneously charges the Department of Corrections and Institutions with fees to which the clerk is not entitled, such fees should be charged back to the clerk.

4. The clerk of the Court of Common Pleas of Montgomery County is not required to reduce the testimony to writing when an appeal is taken to the circuit court.

5. A surety on a bail bond, endorsing an order thereon to take defendant into custody, incurs no court costs if sheriff executed order, such transaction being governed by the contract between surety and sheriff. Title 15, Section 209, Code of Alabama 1940.

6. When defendant is arrested on order of surety before conditional judgment is rendered, and after endorsement by surety under the provisions of Title 15, Section 209, Code of Alabama 1940, and defendant is committed to jail by sheriff, same is lawful commitment to jail entitling sheriff to guard fee. Act No. 483, General Acts 1945, page 721, approved July 7, 1945.

7. Defendant liable for payment of guard fee when he pleads guilty and pays fine and costs.

8. When Highway Patrol officer approves bond of defendant charged with violation of rules of the road, no fee is authorized for approving such bond. Title 36, Section 52, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of June 23, 1947, is as follows:

"We are now in the process of examining the Court of Common Pleas, Montgomery County, Alabama, and would like for you to clear up several matters that are not clear to us.

"Local Acts 1939, page 87, Act #168, creates this Court, provides for its jurisdiction, powers, duties, compensation, etc.

"Under Section 33 of this act, that the same fees and costs that are now or may hereafter be allowed by law to Justices of the Peace in all civil and criminal cases shall be taxed and collected by the clerk in such cases in said court in the same manner as is or may hereafter be provided by law.

"1. Is the State Convict Department liable for costs that is for Docketing the cause, judgment, final judgment where defendant was sentenced to hard labor?

"2. In case your answer to question #1 is in the affirmative, would the defendant be liable for these same costs where he came in and plead guilty and paid fine and cost?

"3. In case your answer to question #1 is in the negative, would we not be correct in charging these items back to the clerk?

"Under Section 18 of said Act, in part we quote, 'From convicts in this court in criminal cases the defendant shall have the right of appeal to said Circuit Court.'

"1. This office being on a salary basis and all fees and commission accrue to Montgomery County, would the Clerk not be liable for cost wherein he failed to reduce the testimony to writing when the transcript was sent to the Circuit Court?

"Under Section 21 of said Act we quote in part, 'That all proceedings as to bail, conditional judgments, forfeitures, judgments final and alias warrants of arrest shall be the same in this court as are now or may be hereafter provided by law.'

"1. In a case where a surety on bond came before the clerk and requested a certified copy of bond, the surety then endorsed on the back of the certified copy: To the sheriff of Montgomery County, Alabama, this is your authority to place into custody the within named defendant. Given under my hand this the _____ day of _____ 1946. Signed by Surety. Bond returned, Executed by arresting and committing to jail, G. A. Mosley, Sheriff. Who would be liable for these costs.

"2. In case your answer is that the surety would be liable for the costs, would the convict department be liable for two guard fees, where one of them was where defendant was placed in jail on a certified copy as above?

"3. In case your answer is that the surety would be liable for the costs, would the clerk not be responsible for these costs where he failed to tax and collect them from the surety on bond?

"4. Would the defendant be liable for any of these costs as mentioned in the above questions?

"In cases of Violating the rules of the Road, wherein the Highway Patrol makes the arrest and approves the bond.

"1. Would it not be a legal charge against the defendant for approving a bond?

"2. In case your answer to question #1 is in the affirmative, would the clerk not be liable for this costs, wherein he failed to tax and collect same?"

Answering your questions in the order in which they occur in your request, you are advised as follows:

1. I do not find that the Department of Corrections and Institutions is liable for costs for the items "docketing the cause, judgment, final judgment."

When a defendant is convicted in the Court of Common Pleas of Montgomery County, the clerk is entitled to tax as costs the same fees and costs "that are now or may hereafter be allowed by law to justices of the peace in all civil and criminal cases." Section 33 of Act No. 168, Local Acts of 1939, page 87, approved March 15, 1939. The fees allowed justices of the peace in criminal cases are listed in Title 11, Section 96, Code of Alabama 1940, and I do not find a fee that a justice of the peace may claim for docketing the cause, entering judgment, or entering final judgment. Since a justice of the peace cannot claim such a fee, there being none provided in Title 11, Section 96, Code of Alabama 1940, and since the clerk of the court of common pleas may claim only the fees allowed justices of the peace by Section 33 of the local act, *supra*, the Department of Corrections and Institutions would not be liable for paying such fees under the provisions of Title 45, Sections 69 and 96, Code of Alabama 1940, even though the fee for docketing the cause, entering judgment, and entering final judgment are listed in that section (Title 45, Section 69). In my judgment, the distinction is that the Department of Corrections and Institutions is authorized to pay these fees, but, of course, a condition precedent is that the officer claiming such fees must be authorized to claim the fees.

In the case outlined in your question number one, the clerk of the court of common pleas does not receive the fees because he is not entitled to claim them, not because the Department of Corrections and Institutions is unauthorized to pay such fees.

2. In answer to your question number two, you are advised that when a defendant pleads guilty and pays a fine and costs before the Montgomery County Court of Common Pleas, he should be charged fees according to the schedule for justices of the peace in Title 11, Section 96, Code of Alabama 1940. However, when he pleads guilty (Title 11, Section 81, Code of Alabama 1940) and the offense is a misdemeanor, and the charge is for violation of Title 23 or Title 36, Code of Alabama 1940, and no appeal is taken, the clerk should not charge a fee for trial or for solicitors fees, or fees for entering judgment. See Title 11, Section 81, Code of Alabama 1940. A sufficient answer to your question number two is that the defendant convicted of a misdemeanor, after pleading guilty, should pay the costs as listed in Title 11, Section 96, Code of Alabama 1940. As stated above, this section does not include the items of docketing cause, judgment, or final judgment.

3. In view of the answer to questions number one and two, if the clerk has charged the Convict Department with costs for docketing cause, judgment, and final judgment, I think that such charges are erroneous, for the reason that I find no fee which the clerk of the court of common pleas can claim for such services. Unless the clerk can point to a clear provision of law authorizing his claim to such fees, they should be charged back to him.

We now come to that part of your inquiry relating to Section 18 of the local act, *supra*.

In answer to your question number one under this section of your request, you are advised that I find no provision of law requiring a clerk or a justice of the peace to reduce the testimony to writing, when an appeal is taken to the circuit court. You probably have in mind Title 11, Section 84, Code of Alabama 1940, as amended by Act No. 58, General Acts 1945, page 59, approved June 1, 1945. This section deals with costs incurred at a preliminary hearing and not with an appeal to the circuit court.

The next part of your inquiry concerns Section 21 of the local act, *supra*.

In answer to your question number one under this division of your inquiry, you are advised that there are no costs incurred under such circumstances. When the surety on a bail bond comes in before a conditional judgment is rendered against him, and obtains a certified copy of the bond and makes the endorsement thereon indicated in your inquiry, when the sheriff arrests the defendant and places him in jail the service of the sheriff is purely a matter of contract between the surety and the sheriff. The surety may designate any person to make the arrest. See Title 15, Section 209, Code of Alabama 1940. If any compensation is due the sheriff, it is purely a matter between the surety and the sheriff. The clerk has nothing whatsoever to do with this transaction. See Quarterly Report of Attorney General, Vol. 14, page 229.

In answer to your question two under this subdivision of your inquiry, you are advised that when the defendant is arrested under the endorsed bond and committed to jail by the sheriff, he is lawfully committed to jail and the Department of Corrections and Institutions will be liable for the guard fee for that commitment. If there had been another commitment, of course, the said Department would be liable for a second guard fee. See Quarterly Report of Attorney General, Vol. 18, page 84, and Act No. 483, General Acts 1945, page 721, approved July 7, 1945.

In answer to your question number three under this division of your inquiry, you are advised that the clerk has nothing to do with the compensation due the sheriff for making the arrest under the endorsed bond. Of course, the clerk would tax the turn-key or guard fee referred to in your question number two in the bill of costs.

In answer to your question number four, you are advised that defendant would be liable for the guard fees discussed in question number two, supra, if he pleaded guilty and paid his fine and costs. If he pleaded not guilty and was sentenced to hard labor, such costs would be paid by the Department of Corrections and Institutions. Act No. 483, General Acts 1945, page 721, approved July 7, 1945.

You now ask two questions relating to cases where the defendant is charged with violating the rules of the road, wherein the Highway Patrol officer makes the arrest and approves the bond.

In answer to your question number one, the Highway Patrol officer approves the bond in such a case, and no fee is authorized for such act. Title 36, Section 52, Code of Alabama 1940.

My answer to your question number one makes unnecessary an answer to your question number two.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 18, 1947.

Hon. Ward W. McFarland,
State Highway Director,
CAPITOL.

Highways — Contractors — Public Works — State Licensing
Board for General Contractors.

1. Highway Director, under provisions of Section 3 of Act No. 492, General Acts 1947 (Ms.), approved September 30, 1947, must consider bids for highway construction from licensed contractors only.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 21, 1947, is as follows:

"I would like to have an opinion from your office concerning Senate Bill 170, a copy of which is enclosed, and House Bill 778, a copy also enclosed, and ask that you specifically advise me as follows:

"(1) Is the last sentence in Senate Bill 170, to-wit: 'It is provided, however, that with respect to the letting and awarding of highway contracts, the Highway Director may issue proposal forms to, consider bids from, and award contracts to all bidders, licensed

or unlicensed, who fulfill the requirements set forth in Chapters 1 and 2 of Title 50 of the 1940 Code.', still the law in view of House Bill 778? Senate Bill 170 was approved on September 18th, 1947, and House Bill 778 on September 30th, 1947; or, in other words, has the Highway Director authority to issue proposal forms to, consider bids from, and award contracts to all bidders, licensed or unlicensed, who fulfill the requirements set forth in Chapters 1 and 2 of Title 50 of the 1940 Code.

"We respectfully call your attention to the fact that House Bill 778, specifically Section 3 thereof, refers to the State Licensing Board for General Contractors, and House Bill 778 being passed subsequently to Senate Bill 170 is, perhaps, in conflict herewith.

"(2) Should it be your official opinion that Senate Bill 170 is the law at this time, does the word 'may' in the last sentence of Senate Bill 170 give the Highway Director absolute discretion or does the word 'may' mean 'must'?"

Senate Bill 170 referred to in your inquiry is Act No. 402, General Acts 1947 (Ms), approved September 18, 1947. House Bill 778 referred to in your inquiry is Act No. 492, General Acts 1947 (Ms.), approved September 30, 1947.

In my judgment, the Highway Director does not have authority to issue proposal forms to, consider bids from, or award contracts to unlicensed contractors.

A general contractor is required to procure a license from the State Licensing Board. Title 46, Sections 65, 66, Code of Alabama 1940. To engage in that business without such license is a crime. Title 46, Section 77, Code of Alabama 1940. As provided in the 1940 Code, the awarding authority, including the Highway Department, could not issue plans or specifications, or receive bids from any person but a licensed general contractor. Title 46, Section 80, Code of Alabama 1940.

On September 18, 1947, Act No. 402, supra, was approved, amending Section 80 of Title 46 of the Code of Alabama 1940. This amendment provided:

"It is provided, however, that with respect to the letting and awarding of highway contracts, the Highway Director may issue proposal forms to, consider bids from, and award contracts to all bidders, licensed or unlicensed, who fulfill the requirements set forth in Chapters 1 and 2 of Title 50 of the 1940 Code."

This amendment, standing alone, evidences a clear legislative intent to allow the Highway Director to award highway contracts to unlicensed contractors, provided those contractors were qualified or met the requirements set out in Chapters 1 and 2 of Title 50 of the Code of Alabama 1940.

Subsequent to the passage and approval of this amendment, Act No. 492, supra, was approved on September 30, 1947. This Act repealed Chapter 1 of Title 50 of the Code of Alabama 1940, the chapter referred to in Act No. 402, supra. Act No. 492, supra, was intended to be a substitute for Chapter 1 of Title 50 of the Code of Alabama 1940 (Section 14, Act No. 492, supra). Section 3 of Act No. 492, supra, prescribes the qualifications of bidders for contracts of public works, including highways. This section provides as follows:

"Section 3. BIDDERS MUST FILE CHECK OR BID BOND.—The bidder shall be required to file with his bid either: (1) a certified check payable to the awarding authority for an amount not less than five per cent of the awarding authority's estimated cost or of the contractor's bid, but in no event more than ten thousand dollars; or (2) a bid bond payable to the awarding authority in an amount not less than ten per cent of the bid or the awarding authority's estimated cost. Such bid guaranties as herein provided shall constitute all of the qualifications or guaranty to be required of contractors as prerequisites to bidding for public works, except as required by the State Licensing Board for General Contractors and the prequalification as required by the Highway Department or the Building Commission."

The concluding sentence of the above section, in my opinion, requires bidders to meet the qualifications established by the State Licensing Board for General Contractors. In short, this section states that all bidders on public works, including roads, shall file with their bid either a check or a bid bond, that such check or bid bond is a sufficient qualification for bidding on public works, except for those qualifications prescribed by the State Licensing Board for General Contractors. It is needless to add that one of the qualifications required by the State Licensing Board for General Contractors is that such contractor be licensed. Act No. 402, supra, and Act No. 492, supra, are, therefore, in conflict. It is my opinion that the last enactment, namely, Act No. 492, supra, requiring the bidder to be licensed, should govern.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 19, 1947.

Honorable J. W. Hamilton,
Tax Collector,
Jefferson County,
106 Court House,
Birmingham, Alabama.

Ad Valorem Taxes—Tax Collector—Taxation—Refunds.

Title 51, Sections 890 and 891, Code of Alabama 1940, as amended by Act No. 402, General Acts 943, page 369, approved

July 10, 1943, do not apply to ad valorem taxes, and such taxes paid to the tax collector of a county should not be certified to the state treasury to be held in a suspense account as provided by said Section 891, as amended.

Opinion by Assistant Attorney General Goodwyn.

Dear Sir:

Your request for an official opinion, bearing date of December 9, 1947, is as follows:

"For the tax year 1947, the Board of Equalization of Jefferson County, raised the taxable value on several thousand pieces of property in this County. Many of the tax payers whose taxable values were raised, have paid or will pay 'under protest,' taxes on the values as fixed by the Board of Equalization, for the tax year 1947. In order that I might know, as Tax Collector, what disposition I should make of the taxes paid 'under protest,' I am asking your opinion as to whether or not, Senate Bill No. 403—Carlton, entitled An Act to amend Section 890 and 891, Title 51, of the Code of Alabama 1940, found on page 369, General Acts, regular session 1943, is constitutional, as far as it relates to ad valorem taxes.

"If your opinion is in the affirmative, does Section 891 of said act require me to pay to the State Treasurer, the full amount of taxes paid 'under protest' which embraces State, County, School and in many instances Municipal taxes? Said taxes to be held by him in an identified suspense account.

"At the termination of any litigation regarding such taxes paid under protest, or if the tax payer fails to bring suit within the period of sixty days after the payment thereof, as specified in said act, is it your opinion that all funds or the part of them that is left in the State Treasurer's hands, (in the event the tax payer recovers part of said taxes), be refunded to me in my official capacity, for disbursement to the proper authorities to which they are due, or shall the State Treasurer make such disbursements?

"Inasmuch as a number of tax payers have made payments 'under protest,' which I will have to dispose of at my regular semi-monthly settlement period, December 15, 1947, I would very greatly appreciate your opinion on or before this date."

In answer to your inquiry, it is my opinion that neither Title 51, Section 890 nor Section 891, Code of Alabama 1940, as amended, is applicable to ad valorem taxes.

It is to be noted that Section 890, *supra*, as amended, expressly excludes ad valorem taxes from the provisions thereof.

These two sections, as amended by Act No. 402, General Acts 1943, page 369, approved July 10, 1943, read, respectively, as follows:

"Section 890. Whenever any taxpayer claims that any tax, except ad valorem taxes, levied under the provisions of this act, as fixed by the officer authorized to collect same is excessive or is invalid, either in whole or in part, the taxpayer shall pay such tax under protest, and the officer receiving the same shall note on the receipt that such tax was paid under protest. The taxpayer shall commence suit against the officer for the recovery of such excessive or invalid tax, as the case may be, within sixty days after the payment thereof under protest, and unless such suit is commenced within that period of time, for the recovery of the amount of taxes claimed to be excessive or invalid, the taxpayer shall be deemed to have waived the payment of such taxes under protest and to have thereby become a voluntary taxpayer. If suit is filed for the recovery of any taxes paid under protest, within the specified period of time, and it is determined upon a hearing of the case that any part of the taxes so paid is excessive or illegal, the same shall be refunded as provided in the succeeding section."

"Section 891. Whenever any money is paid to any officer authorized to receive or collect same, as taxes paid under protest, such officer shall certify such sum of money to the state treasury, with notice to the treasurer that said sum of money was paid under protest by the identified taxpayer and it shall be the duty of the treasurer to hold such sum of money in an identified suspense account until it is judicially determined whether the taxes were legally levied and collected, or the taxpayer abandons the recovery of the money by failure to bring suit within the period of sixty days after the payment thereof. The treasurer shall give notice to the comptroller that such funds are set up in a suspense account and are therefore not available for allotment, allocation, or disbursement until the validity of the assessment and collection is determined by the court. If it is determined by the court, on suit brought by the taxpayer, that any portion of the taxes paid under protest was excessive or illegally assessed and collected, the comptroller shall issue his warrant upon the treasurer for a refund of such sum as may have been determined by the court to be excessive or invalid, and the remainder of such fund, if any, shall be allocated and disbursed as authorized by law."

• This amendatory act was passed in order to provide a constitutional remedy for a taxpayer to secure a refund of taxes, the prior sections providing a remedy, which were Sections 379 and 380 of Act No. 194, General Acts 1935, page 256, at pages 568 and 569, having been declared unconstitutional by the Supreme Court in the case of *J. R. Raible Co. v. State Tax Commission*, et al, 239 Ala. 41, 194 So. 560. It amended both Sections 890 and 891, supra, which were the codifications of Sections 379 and 380, supra, and attempted by means of the two sections, to provide a remedy for a taxpayer to recover taxes which would not contravene the provisions of Section 14 of the Constitution of Alabama 1901, prohibiting a suit against the State. Sections 890 and 891, supra, as thus

amended, were construed and upheld by the Supreme Court in the case of *Glass v. Prudential Ins. Co. of America*, 246 Ala. 579, 22 So. 2d 13.

As amended, these sections deal with the same subject matter and are complementary. The former section provides for the payment, under protest, of taxes, except ad valorem taxes, to the officer authorized to receive the same, and for a suit within sixty days after the payment thereof against such officer for the recovery of such taxes.

The last sentence of such section is as follows:

"If suit is filed for the recovery of any taxes paid under protest, within the specified period of time, and it is determined upon a hearing of the case that any part of the taxes so paid is excessive or illegal, the same shall be refunded as provided in the succeeding section."

This sentence shows that Section 891, as amended, is dependent for its application upon, and relates to, the same type of taxes as dealt with in Section 890, as amended. Furthermore, the first sentence of Section 891, as amended, indicates that such section involves only the taxes which are authorized to be paid under protest by the preceding section. Such sentence is as follows:

"Whenever any money is paid to any officer authorized to receive or collect same, as taxes paid under protest, such officer shall certify such sum of money to the state treasury, with notice to the treasurer that said sum of money was paid under protest by the identified taxpayer and it shall be the duty of the treasurer to hold such sum of money in an identified suspense account until it is judicially determined whether the taxes were legally levied and collected, or the taxpayer abandons the recovery of the money by failure to bring suit within the period of sixty days after the payment thereof." (Emphasis added.)

The reference in both sections to the bringing of suit within sixty days after the payment of the tax also indicates that both sections are limited in their application to the same type of taxes.

The probable purpose of the Legislature in excepting ad valorem taxes from the purview of these sections was to leave the refunding and determination of state, county, and municipal ad valorem taxes to Title 51, Chapter 14, Article 6, Code of Alabama 1940, where the matter is dealt with specifically, and to Title 51, Section 110, Code of Alabama 1940, which provides for the manner in which taxes shall be paid or superseded in the event of an appeal to the circuit court from the final assessment of the board of equalization. The remedies provided in such article for the refund of ad valorem taxes have been upheld in *Patterson v. Pitts*, 180 Ala. 100, 60 So. 390; *Allred v. Dunn*, 207 Ala. 469, 93 So. 390; *Crow v. Outlaw*, 225 Ala. 656, 145 So. 133.

It is, therefore, my opinion that said Sections 890 and 891, as amended, are not applicable to ad valorem taxes, but that the refund of such taxes is covered by Article 6, supra, and Section 110, supra, and that ad valorem taxes paid under protest should not be certified to the state treasury under Section 891, as amended, to be set aside in a suspense account.

Ad valorem taxes paid under protest should be distributed by you according to the provisions of Title 51, Section 223, Code of Alabama 1940, as amended by Act No. 509, General Acts 1935, page 482, with the exception that when making distribution to the authorities authorized to receive the same you should note in writing to such authorities the amount of taxes distributed to them which was paid under protest to you.

In view of the above, answers to your specific questions are unnecessary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 22, 1947.

Hon. A. A. Pate, Sheriff,
Calhoun County,
Anniston, Alabama.
Sheriffs—Feed Bill.

Sheriff of Calhoun County should be paid by the State the cost of feeding prisoners who are turned over to him under Title 37, Section 592, Code of Alabama 1940, and incarcerated in the county jail.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion bearing date of September 19, 1947, is as follows:

"In pursuance of Title 55, Section 240, I respectfully request an opinion as to whether or not the Sheriff of Calhoun County is entitled to be reimbursed for feeding prisoners under the following circumstances, as provided by Title 37, Section 592, 1940 Code of Alabama:

"If a prisoner has worked out the fine and costs due the City of Anniston on a conviction on appeal in the Circuit Court of Calhoun County, Alabama, or if the defendant has served the sentence of the City Court for fine and costs and the prisoner is turned over to the County to work out the costs incurred in the City Court for which sentence has been passed on at the time of rendering judgment

against,—will the Sheriff be allowed out of the fine and forfeiture fund of the County, or compensation by the State, for the prisoners' keep or feed bill in such a case? It has been the practice heretofore in Calhoun County in such a case for the Sheriff to refuse to receive the prisoner from the City, because the Sheriff was under the impression that there were no legal provisions whereby the Sheriff could be reimbursed for the prisoners' keep or feed bill."

In answering your question, when you mention "costs incurred in city court," you mean "costs incurred in circuit court."

In my opinion, you, as Sheriff of Calhoun County, should be paid by the State for feeding prisoners under the facts as outlined in your request.

Title 45, Section 143, Code of Alabama 1940, provides as follows:

"§ 143. Sheriff shall feed prisoners.—The sheriff of the county, except as otherwise provided by existing laws, in person or by his deputy or jailer, shall feed the prisoners in the jail under his jurisdiction in accordance with the terms of this article."

Title 37, Section 592, Code of Alabama 1940, provides as follows:

"§ 592. Prison dues; convict delivered to sheriff.—After the prisoner has worked out the said fine and costs due the city, or served the sentence of the court, he shall, unless said costs are paid, be delivered to the sheriff of the county to work out the costs incurred in said circuit court or other court, for which sentence shall be passed on him at the time of rendering judgment against him in the same manner and to the same extent as if said costs had been incurred in a case for violation of state law."

If you receive prisoners under the section, *supra*, and place them in jail, they will be legally incarcerated in jail and you should be paid by the State for their food.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 22, 1947.

Hon. Pauline Bird,
Register, Circuit Court,
Shelby County,
Columbiana, Alabama.

Costs and Fees—Register's—Title 11, Sections 22, 27, Code
of Alabama 1940.

1. When the Register of the Circuit Court forwards to the State of Alabama money paid by reason of decree on condemnation proceedings of motor vehicle, and does not receive commission on sale, he is entitled to commission under provisions of Title 11, Section 22, Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Madam:

Your request for an official opinion bearing date of October 15, 1947, is as follows:

"I realize that Registers are not entitled to 5% commissions on the remainder of the proceeds from the sale of confiscated automobiles, but where there is no sale, but a cash settlement, and the Register did not receive any commissions would the Register be entitled to 5% commissions on this money, as in Section 22 of Title 11, Code of 1940, Page 269, as it was not a sale under Section 27 of Title 11.

"I am enclosing you a copy of the Court's decree in a case of this kind.

"I would appreciate an early reply to this also."

In my judgment, the Register is entitled to receive 5% of the sum remitted to the State of Alabama. Title 11, Section 22, Code of Alabama 1940.

The decree referred to in your inquiry is as follows:

"IN THE CIRCUIT COURT, SHELBY COUNTY,
ALA.

"No. 2839

"STATE OF ALABAMA,

Complainant,

vs.

ONE 1946 CHEVROLET AUTOMOBILE,
CHESTER LEE EDWARDS AND WM.
LEONARD EDWARDS,

Respondents.

"This cause coming on to be heard the State of Alabama by and through its Solicitors confessed and agreed that Claimant's claim is valid and binding and that said Respondent is due said Claimant the sum set out in said claim.

"The Court hearing evidence as to the value of the automobile in question in this cause determined from said evidence that the Respondent owned an equity in said automobile of the value of \$200.00.

"It is, therefore, ordered, adjudged and decreed by the Court that upon Claimant paying to the Register of this Court the sum of \$200.00 and the court cost accrued that this cause be and the same is dismissed.

"Done in term time at Columbiana, Alabama, on this the 8th day of October, 1947.

W. W. Wallace,
Judge."

When an automobile or vehicle is condemned for transporting prohibited liquor and it is ordered that the automobile be sold, the Register is entitled to commission on sale as provided for in Title 11, Section 27, Code of Alabama 1940. Biennial Report of Attorney General, 1928-30, page 883.

If the Register receives a commission on sales under provisions of Title 11, Section 27, Code of Alabama 1940, it has been held that he is not entitled to an additional fee of 5% for remitting money to the State of Alabama under provisions of Title 11, Section 22, Code of Alabama 1940. See Quarterly Report of Attorney General, Vol. 25, pages 143, 146. In other words, if the Register receives a fee for the sale under the provisions of Section 27, supra, it is intended that this fee be compensation for forwarding the amount to the State.

Under the facts outlined by your letter, the Register has not received any commission for sale under Section 27, supra, and it is my opinion when he forwards certain proceeds of the judgment to the State of Alabama, he is entitled to 5% of such remittance.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 22, 1947.

Hon. A. R. Meadows, Superintendent,
State Department of Education,
CAPITOL.

Schools—Election Expenses.

School funds may not be used for the expenses of calling and holding an election in City of Decatur as provided by Act No. 190, General Acts 1945, page 316, but such expenses must be paid by Morgan County.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of November 24, 1947, is as follows:

"The City of Decatur called and held an election on the levy and collection of an ad valorem tax which stated in the face of the ballot that the proceeds from such tax if levied would be used for schools. The city governing officials held this election. The City Board of Education has been requested to pay for the expenses of calling and holding this election. Your answer to the following question will be appreciated:

"Can a City Board of Education legally use school funds to pay for the expenses of calling and holding an election which is called and held by the city governing body for the purpose of levying ad valorem taxes solely for school purposes?"

In my opinion, your question should be answered in the negative.

Section 1 of Act No. 190, General Acts 1945, page 316, provides, in part, as follows:

"Section 1. * * * * * Upon the adoption of this amendment the governing body of Morgan County shall order an election at which the qualified electors of the City of Decatur shall determine whether or not such special tax shall be levied and collected on taxable property in said city. Said election shall be held and determined as now provided by law for determining whether or not the special one mill county school tax shall be levied. * * * * *

The statutory law relative to the one-mill county school tax is found under Title 52, Sections 246-253, inclusive, of the 1940 Code of Alabama.

Sections 248, 250 and 253, under said Title, are as follows:

"§ 248. Officers of Election—The inspectors and officers of the election shall be appointed and such elections shall be held and the result of said elections shall be declared in the same manner and by the same officers as is the result of the regular elections for county officers under the general laws of the state."

"§ 250. Ballot and election supplies.—The court of county commissioners, or court of like jurisdiction, shall provide a sufficient number of ballots for each voting precinct within said county, and at the top of each ballot shall be printed the rate of such proposed tax, the time it is to be continued, and that the purpose is for the support of the public schools, and directly underneath in plain type shall be printed on different lines the words, 'For proposed taxation,' 'Against proposed taxation,' and a place must be left directly to the left of each line thereof, and the voters favoring the proposed taxation will make a cross mark directly to the left of the line, 'For proposed taxation,' and the voter not favoring proposed taxation will make a cross mark directly to the left of the line 'Against proposed taxation.'"

"§ 253. Compensation of election officers.—The election hereinbefore provided for may be had at the time of holding any regular election within the county, and if held at any such time the inspectors and officers of the general election shall conduct at the same time the election herein provided for; and for such services they shall receive no compensation other than that allowed them for the holding of the general election; but if such an election is had at any other time than that of holding a regular election within the county, then the election officers shall receive the same pay as that for holding a general election."

In my opinion, it was the intention of the Legislature that the expenses of calling and holding this election should be paid by Morgan County, just as the county pays the costs incurred in the regular election of county officers under the general law of the State. Cf. opinion of this office found in Quarterly Report of Attorney General, Vol. 40, page 25.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 22, 1947.

Hon. Chester Walker, Chairman,
Board of Revenue,
Tuscaloosa County,
Tuscaloosa, Alabama.

Justices of the Peace—Costs and Fees—Fine and Forfeiture Fund—Inferior Court of Tuscaloosa County, Alabama—Title 11, Sections 96 and 97, Code of Alabama 1940; Title 13, Section 418, Code of Alabama 1940; Title 15, Sections 117 and 393, Code of Alabama 1940—Local Acts 1927, p. 130—Opinions Overruled, Quarterly Report of Attorney General, Vol. 35, p. 51, Quarterly Report of Attorney General, Vol. 6, p. 59.

1. Fees of justices of the peace for taking an affidavit and issuing a warrant of arrest when case is disposed of in justice court not payable from fine and forfeiture fund of the county or its equivalent.

2. Fees of justices of the peace for complaint made before him and for issuing warrant of arrest returnable to Inferior Court of Tuscaloosa County or same fees when case is appealed to circuit court do not become a claim upon the fine and forfeiture fund of the county or its equivalent.

3. Fees of justices of the peace for issuing a search warrant cannot become claim upon the fine and forfeiture fund of the county or its equivalent.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of February 5, 1947, is as follows:

"In Re: Claim of Judge W. E. Lathram, Justice of Peace, against Tuscaloosa County, Alabama. Amount \$177.00 for cases not pressed or dismissed and originating in the Justice Court of Judge W. E. Lathram.

"Judge W. E. Lathram, Justice of Peace, has filed a claim with the Board of Revenue against Tuscaloosa County, Alabama, for \$177.00.

"1. Judge Lathram is the Justice of Peace for Beat 16 in Tuscaloosa County, Alabama. He takes affidavits, issues warrants of arrest sometimes returnable to his Court. These cases are tried in his

Court and sometime the defendant is convicted and sometime he is acquitted.

"2. Judge Lathram frequently takes affidavits and issues warrants of arrest returnable to the Inferior Court of Tuscaloosa County, Alabama. These cases are tried by the Judge of the Inferior Court. Sometime the defendant is convicted and sometime he is acquitted.

"3. Frequently Judge Lathram issues search warrants directed to the Sheriff or lawful officer of Tuscaloosa County.

"Judge Lathram is of the opinion that he should be paid his cost in all cases nol prossed or where the defendant is not found guilty.

"For your information I am attaching to my letter a copy of a statement that Judge Lathram has filed with the Board of Revenue for his claim against Tuscaloosa County.

"I am County Attorney for Tuscaloosa County, Alabama, and the Board of Revenue has requested me to ascertain from you whether or not the County should pay the claim of Judge Lathram. All members of the Board of Revenue would appreciate very much if you would give them or to me for them your opinion as to the liability of Tuscaloosa County to Judge Lathram for the bill he has filed with the County."

We also have your letter of February 14, 1947, clarifying the original questions asked which states in part as follows:

"Proposition One.—Judge Lathram frequently takes affidavits, issues warrants of arrest in criminal cases involving matters within his jurisdiction, and these warrants of arrest are returnable to his court. He tries these cases or disposes of the same. Sometimes the defendant is convicted; sometimes the defendant is acquitted; sometimes the case is 'nol prossed.' Frequently in each of the above instances, the court costs in each of such cases are not paid by the defendant or any other person.

"Question One.—Is Tuscaloosa County liable to Judge Lathram for any court costs in any of such cases as above stated? Judge Lathram claims that the County is liable when he is not paid in such cases.

"Proposition Two.—Frequently Judge Lathram takes affidavits, issues warrants of arrest in criminal cases returnable to the Inferior Court of Tuscaloosa County, Alabama. Such cases are disposed of by the Judge of the Inferior Court. Sometimes the defendant is convicted; sometimes the defendant is acquitted; sometimes the case

is 'nol prossed.' Sometimes the defendant in such cases appeals his case to the Circuit Court, where some defendants are acquitted, some are convicted, and some of the cases are 'nol prossed.' Sometimes in such cases, Judge Lathram is not paid his costs by the defendant or any other person.

"Question Two.—Is Tuscaloosa County liable to Judge Lathram in any of such cases when he has not been paid his costs by the defendant or anyone else? Judge Lathram claims that the County is liable to him in such cases.

"Proposition Three.—Frequently Judge Lathram issues search warrants in criminal cases directed to the Sheriff of Tuscaloosa County, Alabama. Sometimes he is not paid any court costs in such cases by the defendant, or anyone whose premises are searched, or anyone else.

"Question Three.—Is Tuscaloosa County liable to Judge Lathram for costs incurred in the issuance of such search warrants? Judge Lathram claims that the County is liable to him for such court costs when they are not paid."

I.

In answer to your question one (following proposition one), you are advised that the county is not liable to the justice of the peace for such claims.

When a justice of the peace takes an affidavit and issues a warrant of arrest in criminal cases within his jurisdiction, he is entitled to a fee of twenty-five cents for taking affidavit (for complaint made before him) and also fifty cents for issuing a warrant of arrest. Title 11, Section 96, Code of Alabama 1940. These fees are court costs and should be taxed and collected as provided for by Title 11, Section 97, Code of Alabama 1940. Section 97, *supra*, provides as follows:

"In prosecutions before a justice of the peace where the case is not taken to the circuit court by appeal, or otherwise, the fees above specified, for such services as may be rendered in the case, must, unless otherwise provided, be taxed by him as costs, and collected by execution, as in cases tried in the county court; and in all other cases, must be certified by him to the court to which the proceedings are removed, or to which process is returnable, and there taxed and collected like other costs."

Therefore, when a justice of the peace disposes of a criminal case in his own court, whether the defendant is convicted, acquitted or a nolle prosequi entered, and the proceedings are not taken to another court, the justice should tax the costs, which are collected the same as in the county court. If the case is removed to another court the justice court

costs are certified to the other court and there taxed and collected "like other costs."

Your first inquiry concerns criminal cases wherein the defendant is (1) found guilty, (2) acquitted, or the case is (3) nolle prossed and the costs are not paid by the defendant or anyone else. Is the county liable for such costs?

In my opinion the county is not liable.

If the defendant is convicted the justice's fees should be taxed in the bill of costs and collected by execution against the defendant. Title 11, Section 97, Code of Alabama 1940. If execution is returned "no property found" the justice may pay his fees from his "insolvency fund" under the provisions of Title 13, Section 418, Code of Alabama 1940.

If the defendant is acquitted the justice may also collect his fees from his "insolvency" or "justice of the peace fine and forfeiture fund" under the provisions of Title 13, Section 418, Code of Alabama 1940.

If the case is nolle prossed the justice cannot be paid his fees from the "insolvency" or "justice of the peace fine and forfeiture fund" for the reason that a judgment of nolle prosequi is not an acquittal within the meaning of Title 13, Section 418, supra.—Quarterly Report of Attorney General, Vol. 18, pp. 272 and 366.

It has been held that a justice of the peace is not an "officer of the court" within the meaning of Title 15, Section 393, Code of Alabama 1940 (allowing certain officers' fees to be paid from the fine and forfeiture fund). Therefore, his fees cannot be claimed from the county under this section. *Bilbo v. Drakeford*, 78 Ala. 318; *McPherson v. Boykin*, 76 Ala. 602; *Cabler v. Mobile County*, 230 Ala. 118, 159 So. 692.

In answer to your question one, therefore, it is my opinion that such justice of the peace fees cannot be claimed from the county.

II.

We now consider those cases where the warrant is made returnable to the Inferior Court of Tuscaloosa County, and also those cases wherein the case is appealed to the circuit court.

The Act establishing the Inferior Court of Tuscaloosa County provides that justices of the peace within Tuscaloosa County are authorized to issue warrants returnable to said Inferior Court provided the solicitor or deputy solicitor of the county gives his written approval.—Act #228, Local Acts 1927, p. 130, Section 15. For this service the justice of the peace is entitled to the fee therefor.—Title 11, Section 96, Code of Alabama 1940.

Title 11, Section 97, *supra*, requires that these fees "be certified by him to the court to which the proceedings are removed, or to which the process is returnable, and there taxed and collected like other costs." Section 4 of the Act, *supra*, creating the Inferior Court of Tuscaloosa County, provides how costs may be collected as follows:

"* * * It shall be the duty of said Clerk to tax and collect * * * the same costs, fines, and fees in criminal cases as are now allowed by law to be assessed, charged and collected in the justice of the peace courts, in all criminal cases, of which the justices of the peace now have jurisdiction. In all other criminal cases the same costs, fines, and the same fees for the services of the Solicitor, Clerk, and the Sheriff and witnesses in said court shall be assessed and collected as are now provided by law to be assessed and collected for such offenses in the County Court of Tuscaloosa County, Alabama * * *"

In short, when the warrant issued by the justice of the peace is returnable to the Inferior Court, the Inferior Court should, by the terms of Section 97, *supra*, tax and collect the justice's costs "like other costs."

In my judgment, this means that justice's costs should be taxed against the defendant if convicted and paid by him or else collected by execution against the defendant. If he is acquitted or the case is nolle prossed or the defendant is insolvent, it is my judgment that justice court fees do not become a claim against the fine and forfeiture fund of the county. It has been held that the statutory provision that such fees are to be taxed and collected as other costs merely refers to the general statutory mode of collecting costs in criminal cases and does not authorize the claimant to receive his fees from the fine and forfeiture fund of the county *McPherson v. Boykin, supra*. #
/

Some opinions of this office have held otherwise. Quarterly Report of Attorney General, Vol. 35, page 51 (holding that justices' fees are payable from county fine and forfeiture fund when warrant is returnable to the county court). Quarterly Report of Attorney General, Vol. 6, page 59 (same). Other opinions hold that the justices' fees cannot become a claim against the fine and forfeiture fund. Quarterly Report of Attorney General, Vol. 14, page 66 (holding that justices' fees cannot be paid from fine and forfeiture fund when warrant made returnable to the county court).

It is my view that those opinions of this office, cited above, and any other opinions, holding that justices' fees may become a claim upon the fine and forfeiture fund of the county, are in error in that such opinions do not take into consideration the holding in the case of *McPherson v. Boykin, supra*. This case has not been overruled nor has the statute therein discussed been materially changed. The decision is cited as late as the case of *Cabler v. Mobile County, supra*. The *Cabler* case follows the holding in the *Boykin* case, *supra*, stating that Title 11, Section 97,

Code of Alabama 1940, does not authorize payment of justices' fees from the county fine and forfeiture fund.

Therefore, when a criminal case originates in a justice of the peace court and is later removed to another court by the warrant being returnable to another court or by appeal, the justice court fees should be certified to the court to which the proceedings are transferred and there taxed and collected like other costs. But, if the costs are not collected, Section 97, *supra*, does not authorize justice court costs to become a claim against the fine and forfeiture fund.

III.

For issuing a search warrant, a justice of the peace is entitled to a fee of seventy-five cents. Title 11, Section 96, Code of Alabama 1940. A search warrant can only be issued on probable cause, supported by affidavit. Title 15, Section 102, Code of Alabama 1940. Before the warrant issues the complaining party must pay the fee for issuing the warrant. Title 15, Section 117, Code of Alabama 1940. In the *Cabler case*, *supra*, it was expressly held that a justice of the peace could not receive his fee for issuing a search warrant (in a liquor seizure case) from the fine and forfeiture fund of the county or from the general fund.

I find no authority of law, therefore, for justices' fees to be paid by the county.

Yours very truly,

A. A. CARMICHAEL,

Attorney General.

December 22, 1947.

Hon. J. M. Holt, Chairman,
Limestone County Board of Revenue,
Athens, Alabama.

Courts of County Commissioners—Contracts—Title 12, Section 29, Code of Alabama 1940; Title 41, Sections 211 and 221, Code of Alabama 1940.

There is no prohibition against a corporation, owned in part by a member of the Board of Revenue of Limestone County, Alabama, entering into a contract with the State of Alabama for road construction or repair, even though such work be performed in Limestone County, Alabama, and be paid for in part by funds of Limestone County.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion, bearing date of October 28, 1947, is as follows:

"Mr. Edward Burgreen is a member of the Limestone County Board of Revenue. Mr. Edward Burgreen is also a stockholder and official of the Burgreen Contracting Company, Inc. The corporation is licensed by the General Contracting Licensing Board and is pre-qualified by the State Highway Department as a qualified bidder or contractor for state highway contracts.

"Please advise by an official opinion as to whether Burgreen Contracting Company, Inc. is barred from accepting contracts from the State Highway Department for work done in Limestone County by Title 12, Section 29, or Title 41, Section 211 or 221, Code of Alabama, 1940, in view of Mr. Edward Burgreen's official position with this board.

"Would your opinion on this matter be different if the contract from the State Highway Department for work done in Limestone County was for a project financed partially by funds of Limestone County? See in this connection Quarterly Reports of Attorney General, Volume 19, Page 236, and authorities cited therein."

In my opinion, each of your inquiries must be answered in the negative, as I find nothing within any of the statutes cited by you in your inquiry, nor within any of the other statutes of the State to prevent a corporation, owned in part by a member of a county governing body, from entering into a contract with the State of Alabama for road construction or repair, even though such work be performed in the county of which such person is a member of the county governing body and be paid for in part by funds of the county.

Title 12, Section 29, Code of Alabama 1940, deals only with contracts of the county, the intent of such section being to preclude any member of the county governing body from making any contract in which the county is interested with any person related to him, either by blood or marriage, within the fourth degree. Such section has no connection with, nor bears any relation to, contracts entered into by the State of Alabama; hence, it can act as no prohibition against such a contract as that here considered.

Title 41, Section 211, Code of Alabama 1940, prohibits state or county officials from entering into contracts with the county, either as principal or agent, and provides a penalty for such acts. Such section provides, in pertinent part, as follows:

"Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or sells any goods or supplies to the county, or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county for not exceeding twelve months; * * *

This section is penal in nature and must be strictly construed, and is applicable only to contracts with the county. Biennial Report of Attorney General, 1936-1938, page 723; Quarterly Report of Attorney General, Vol. 16, page 208.

It is a well accepted principle of law that a corporation is a distinct entity to be considered separate and apart from the individuals who compose it. *Navco Hardware Co. v. Bass*, 214 Ala. 553, 108 So. 452.

It has likewise been repeatedly held by former opinions of this office that, in view of such principle of law, there is no prohibition against a county official, on behalf of the county, entering into a contract with a corporation owned in part by such county official, as such official is not pecuniarily interested in such transaction so as to come within the inhibitions of Section 211, supra. Quarterly Report of Attorney General, Vol. 19, page 236, and authorities cited therein.

It is, therefore, my opinion that Section 211, supra, is no bar to such contract for two reasons. First, such section, being penal in nature, must be strictly construed; and it is, therefore, only applicable to contracts with the county. The contract here considered is a contract with the State of Alabama. Secondly, the contracting party is a corporation and not an individual. Therefore, as pointed out above, such a contract does not fall within the inhibitions of this section.

Neither do the provisions of Title 41, Section 221, Code of Alabama 1940, prohibit such a contract. Such statute provides in pertinent part as follows:

"Every public officer who shall:

* * * * *

"2. Be beneficially interested, directly or indirectly, in any contract, sale, lease, or purchase which may be made by, through or under the supervision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein;

* * * * *

"Shall be fined not more than one thousand dollars and may be sentenced to hard labor for the county for not more than six months, and any contract, lease, sale, or purchase mentioned in subdivision 2 hereof shall be void."

It is readily apparent that such statute acts as no bar to the contract here under consideration, inasmuch as such contract is in no way associated with the office of county commissioner or member of a board of revenue but is a contract entered into between a certain contracting firm and the State of Alabama. Such being the case, it is my opinion that such statute bears no relation to this contract and certainly is no prohibition against such a contract.

It is, therefore, my opinion that the corporation named in your inquiry is not barred from contracting with the State of Alabama for road construction or repair, even though such work be performed in Limestone County and be paid for in part by funds of Limestone County.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 29, 1947.

Hon. M. W. Forman,
Judge of Probate,
St. Clair County,
Ashville, Alabama.

Costs and Fees—Lunacy Inquisition.

1. Fees of jurors and witnesses in inquisitions of lunacy are payable out of the county treasury. Title 11, Sections 16 and 52, Code of Alabama 1940.

2. Other costs should be taxed against the estate of the person of unsound mind.

3. If the petition be dismissed, such other costs should be taxed against the petitioner.

Opinion by Assistant Attorney General Barton.

Dear Sir:

Your request dated September 24, 1947, for an official opinion, is as follows:

"Please advise if the costs of trials on insanity of a person over twenty-one years of age which is tried in Probate Court under a

jury of six can be charged to the petitioner. I have been unable to find the section on the costs of the proceedings of such a case."

I assume that you refer to the costs of an inquisition of lunacy, the proceedings of which are covered by Title 21, Section 11, Code of Alabama 1940 and to Section 12, of the same Title, as amended by Act No. 468, General Acts 1945, page 704, approved July 7, 1945, the purpose of such inquisition being to determine whether a person having an estate is of unsound mind.

If so, your question is answered in the affirmative provided the petitioner fails to establish the lunacy. In *Campbell v. Campbell*, 39 Ala. 312, it was held that the costs of an inquisition of lunacy may be taxed against the petitioner if the petition is dismissed.

It is otherwise if the petitioner is successful and the person proceeded against is declared to be a lunatic. I am of the opinion that in such event costs should be taxed against the estate of the person declared to be of unsound mind.

In either event, the costs represented by pay of jurors and witnesses are payable out of the county treasury.—See Title 11, Sections 16 and 52, Code of Alabama 1940, and Title 11, Section 98, Code of Alabama 1940, as amended by Act No. 297, General Acts 1947 (Ms.), approved August 7, 1947. Other costs, such as the Judge of Probate's fee (Title 11, Section 29, Code of Alabama 1940), the Sheriff's fee (Title 11, Section 34, Code of Alabama 1940), and the fee of a guardian ad litem (Title 7, Section 180, Code of Alabama 1940) should be paid out of the said estate.—Quarterly Report of Attorney General, Vol. 28, page 102; Quarterly Report of Attorney General, Vol. 10, page 181; Biennial Report of Attorney General 1936-38, page 593.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 29, 1947.

Honorable Henry W. Sweet, Director,
State Docks and Terminals,
Mobile, Alabama.

State Docks Commission—Revenue Securities—State Depositories

Act No. 211, General Acts 1947, approved July 24, 1947;
Act No. 411, General Acts 1947, approved September 25, 1947;
Title 38, Sections 11 and 30, Code of Alabama 1940.

1. Those revenue securities issued pursuant to the provisions of Act No. 211, General Acts 1947, approved July 24, 1947, are,

at the time of issuance, legal investments for trust funds in the State of Alabama.

2. Such securities may be legally accepted by the State Treasurer and by the Treasurer of the Department of State Docks and Terminals as security for deposits of State funds and Department funds, if said depositories have, in all other respects, qualified under the law.

3. It is the duty of the State Treasurer and the Treasurer of the Department of State Docks and Terminals to accept and keep safe such securities when offered by depositories which have, in all other respects, qualified under the law.

Opinion by Assistant Attorney General Hardin.

Dear Sir:

Your request for an official opinion bearing date of December 26, 1947, is as follows:

"The Department of State Docks and Terminals recently offered \$4,000,000 in revenue securities as provided for by Act No. 211, approved July 24, 1947. Your official opinion is requested on the following matters:

"1. Are the bonds at the time of issuance legal investments for trust funds in Alabama.

"2. Are said bonds legally qualified and acceptable as security for deposits of the State of Alabama and of the Department of State Docks and Terminals.

"3. Is it the duty of the State Treasurer and the Department Treasurer to accept the bonds when offered by depositories which are otherwise qualified under the law.

"A certified copy of Act No. 211 is enclosed for your convenience. The offers for the bonds are conditioned upon your opinion answering the foregoing inquiries in the affirmative."

The answer to your first inquiry must be in the affirmative.

Act No. 211, General Acts 1947, approved July 24, 1947, makes provision for the issuance of "Revenue Securities" designed to finance the expansion of the port facilities of the State. This act, after making provision for the issuance and redemption of such securities, provides as follows:

"The Revenue Securities issued under the provisions of this act are exempt from any or all State, County, Municipal and other taxation whatsoever under the laws of the State of Alabama, and shall be legal investments for the funds for executors, administrators, trustees and guardians, and acceptable as security for deposits of State funds.

* * * * *

In view of the express provisions of the act, as above set out, it is my opinion that the revenue securities issued pursuant to such act are, at the time of issuance, legal investments for trust funds in this State.

The answer to your second inquiry must likewise be in the affirmative, for, as above noted, Act No. 211, supra, in making provisions for the issuance of such revenue securities, specifically provides that such securities shall be acceptable as security for deposits of State funds.

Cognizance must also be given the provisions of Act No. 411, General Acts 1947, approved September 25, 1947, which act amends the statutes of the State governing the manner in which application shall be made by bank or trust company for designation as a State depository and the security which must be furnished by those bank or trust companies so applying. This act provides that:

"The only bonds or securities which can be accepted as security, or for which receipts can be accepted as security, for the deposit of State funds are the direct obligations of the State of Alabama or the direct obligations of the United States Government, the bonds and other securities issued by Alabama Bridge Finance Corporation, the bonds and other securities issued by Alabama Highway Finance Corporation, the bonds and other securities issued by Alabama Public Schools Corporation, and the bonds to secure the payment of which any rentals or revenues of the Department of State Docks and Terminals have been pledged prior to January 1, 1948. * * * * *

(Emphasis supplied.)

It is significant to note that each of these acts were passed by the 1947 session of the Legislature. It is, therefore, my opinion that, construing the provisions of said acts separately or in *pari materia*, it becomes readily apparent that it was the intention of the Legislature that those securities issued under the authority of Act No. 211, supra, should be legally qualified and acceptable as security for deposits of State funds with those banks or trust companies designated as State depositories.

It should be pointed out, however, that said act further provides that: " * * At least sixty per cent of the first ten thousand dollars principal amount of any securities so deposited or receipts for which are so deposited must consist of the direct obligations of the State of Alabama, but the bank or trust company shall have the privilege of making the balance of its deposit in any of the other bonds or securities hereinabove set forth or in receipts representing any of the bonds or securities hereinabove set forth. * * * * "

I am, therefore, of the opinion that, subject to this limitation, those banks or trust companies designated as State depositories may properly offer as security for the deposit of State funds those securities issued pursuant to the provisions of Act No. 211, supra.

It is my further opinion that such securities, if so approved by the Governor and by the Director of the Department of State Docks and Terminals, may be accepted by the Treasurer of the Department of State Docks and Terminals as security for the deposit of funds of said Department.

Title 38, Section 30, Code of Alabama 1940, provides as follows:

"The secretary-treasurer of the department shall deposit such funds as are received by him as such secretary-treasurer from time to time in such bank or banks as may be designated by the department and approved by the governor; provided, that such funds shall not be deposited in any bank in which any member of the department is interested either directly or indirectly. The department shall require that any bank or banks receiving such deposits shall secure the same by a deposit of harbor improvement bonds, or by state bonds of the State of Alabama, United States government securities or such other securities as may be approved by the governor and the department. The department and the governor shall if possible require interest to be paid on such deposits carried in any bank or banks."

In view of this provision of law it is my opinion, as above stated, that, if such securities be so approved by the Governor and the Director of the Department of State Docks and Terminals, they may legally be accepted by the Treasurer of the Department as security for deposit of funds of the Department.

Your third inquiry concerns the duty of the State Treasurer and the Treasurer of the Department of State Docks and Terminals to accept such revenue securities when offered by depositories which are otherwise qualified under the law.

The powers, functions and duties of the State Treasurer are found set out in Title 55, Section 211, Code of Alabama 1940. One of the provisions of this statute is to the effect that the State Treasurer shall "Have the custody of and to keep safe all monies, bonds, mortgages, and other securities required or permitted by law to be deposited with the state or any officer thereof by any bank, trust company, insurance company, mutual aid or benefit association, or other person or corporation, and also all securities held by the state, including those held for the account of any sinking fund (including those heretofore in the custody of the sinking fund commission.) * * *"

As I construe this provision its purpose is to commit to the custody of, and to impose the duty of safe-keeping upon, the State Treasurer all

monies or other securities enumerated therein coming into his possession. Such statute vests no discretion in the State Treasurer but, in my opinion, merely vests the authority and imposes the duty above set out. It is, therefore, my opinion that should any of those securities issued under the provisions of Act No. 211, supra, be tendered the State Treasurer as security for deposit of State funds, said officer should then take custody of such securities and keep them safe in the manner provided by law, this being conditioned, of course, upon the bank or trust company making application for designation as a State depository having otherwise qualified, in all respects, as required by law.

The same is true of the Treasurer of the Department of State Docks and Terminals. The duties of such officer are found set out in Title 38, Section 11, Code of Alabama 1940, which statute provides as follows:

"The secretary-treasurer shall receive and disburse for the department, under the supervision of the director, all moneys which the department is authorized to receive and disburse. He shall be responsible for the safe-keeping thereof and shall properly account therefor."

It is my opinion, as above stated, that should those securities issued pursuant to the authority of Act No. 211, supra, be approved by the Governor and the Director of the Department of State Docks and Terminals as securities which may be accepted as security for the deposit of funds of the Department, the Treasurer of the Department would then be authorized, and it would become his duty, to receive such securities and to keep them safe, such likewise being conditioned upon the depositories so effected having complied in all other respects with the law governing the same.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 30, 1947.

Hon. T. C. Almon,
Judge of Probate,
Morgan County,
Decatur, Alabama.

Board of Registrars—Voters.

The board of registrars may register voters during the time fixed by statute for purging the registration list. Title 17, Section 44, Code of Alabama 1940; Act No. 346, General Acts 1945, page 563.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of November 24, 1947, is as follows:

"Mr. T. H. Gunn, Chairman of the Board of Registrars of Morgan County has asked me to write you for your official opinion on the following facts:

"Title 17, Section 44 of the Code of Alabama says that the Registrars shall be in session six days beginning on the first Monday in January of even years for purging the list.

"House Bill 250 approved July 9, 1945 recites among other things that the Board of Registrars of every County shall be in session at the Court House on the first and third Mondays in each month for the purpose of registering all persons qualified under the laws of the State of Alabama to register.

"Since this is a conflict he wants to know if they could register persons who are qualified on the first Monday in January of 1948 when they meet for the purpose of purging the list."

This office has held that the board of registrars is without authority to register voters during the time fixed by statute for purging the registration list. Biennial Report of Attorney General, 1932-34, page 452; Quarterly Report of Attorney General, Vol. 17, page 397. These opinions were based on the fact that there was no statute authorizing the board of registrars to register voters on the date fixed by statute for purging the registration list.

Under the provisions of Title 17, Section 44, Code of Alabama 1940, the board of registrars is required to meet "on the first Monday in January 1940, and every two years thereafter, for purging the registration list, and may continue in session one week."

Act No. 346, General Acts 1945, page 563, requires the board of registrars to meet "on the first and third Mondays in each month for the purpose of registering all persons in the armed forces of the United States, Merchant Marine, Red Cross, and other affiliated organizations, stationed or serving outside the county of their residence, and all other persons otherwise qualified under the laws of the State of Alabama to register."

The fact that under the provisions of Section 44, supra, the meeting of the board of registrars is for the purpose of purging the registration list would not preclude the board from registering a person as required

by Act No. 346, supra. There is no reason why the Board cannot meet on the same day for the purpose of purging the registration list and for the purpose of registering voters.

It is, therefore, my opinion that your inquiry must be answered in the affirmative.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 30, 1947.

Hon. L. O. Johnston,
Clerk, Circuit Court,
Coosa County,
Rockford, Alabama.

Sheriffs—Costs and Fees—Mileage.

1. Act No. 177, General Acts 1947, approved July 21, 1947, providing for payment to sheriff of ten cents per mile when traveling to serve a writ of arrest, is not payable when some other law authorizes same fee for similar services.

2. The legislature did not intend to provide double fees to sheriff in Act No. 177, General Acts 1947, approved July 21, 1947.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of October 15, 1947, is as follows:

"Will you please advise me whether or not a sheriff is allowed to collect .20 cents per mile for mileage in arresting a person for violation of the prohibition law.

"In other words under our prohibition statute the sheriff is allowed .10 cents per mile as cost in arresting and bringing criminal to jail. The question is he allowed another or additional .10 cents for bringing a violator of this law under HB. 315, by Garrett, passed by the present legislature and approved by the Governor on the 21st day of July 1947."

In my judgment, the sheriff is not entitled to a double fee of twenty cents a mile for traveling to execute a writ of arrest.

Under certain statutes of the prohibition law, for example, Title 29, Sections 152 and 237, Code of Alabama 1940, there is allowed to the officer performing the services a fee of ten cents per mile. House Bill 315, referred to in your inquiry (Act No. 177, General Acts 1947, approved July 21, 1945), provides for a fee to the sheriff in certain counties of ten cents per mile for serving a writ of arrest.

In my judgment, the legislature did not intend to provide double fees for similar services. When a specific statute, such as Title 29, Sections 152 and 237, Code of Alabama 1940, provides for a specific fee of ten cents per mile to the sheriff, then it is my opinion the sheriff could not claim another ten cents per mile, under the provisions of Act No. 177, supra. Act No. 177, supra, was designed to allow the sheriff ten cents per mile for traveling to serve a writ of arrest, when he was not given such mileage by some other provision of law.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 30, 1947.

Hon. Ralph P. Eagerton,
Chief Examiner of Public Accounts,
Division of Examiners of Public Accounts,
CAPITOL.

Sheriffs—Costs—Fine and Forfeiture Fund.

1. In prosecution for vagrancy or non-support under the provisions of Title 14, Section 437, Subsection 8, Code of Alabama 1940, sheriffs' costs attach the same as in other misdemeanor causes, and are payable as provided in Title 11, Section 83, Code of Alabama 1940.

2. The sheriff is entitled to the guard fee of \$2.00 each time a prisoner is lawfully committed to jail. Act No. 483, General Acts 1945, page 721, approved July 7, 1945.

3. Guard fees of sheriffs should be paid out of the convict fund or the funds of the Department of Corrections and Institutions, when defendant is convicted and sentenced to the penitentiary. Act No. 483, General Acts 1945, page 721, approved July 7, 1945.

4. The sheriff is entitled to the guard fee of \$2.00 from the funds of the Department of Corrections and Institutions by reason of Act No. 483, General Acts 1945, page 721, approved July 7, 1945, and not by virtue of Title 45, Section 69, Code of Alabama

1940, as amended by Act No. 57, General Acts 1945, page 58, approved June 1, 1945.

5. Opinion to Hon. J. A. Hill, Sheriff, Clarke County, under date of August 29, 1947, is hereby overruled.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion under date of October 3, 1947, is as follows:

"Please refer to your opinion of August 29, 1947, addressed to Honorable J. A. Hill, Sheriff, Clarke County, Alabama as to guard fees.

"Also, refer to General Acts 1945, # 483, Page 721.

"There appears to be an apparent conflict in the Opinion and the Act, in that the Act, Section one, reads:

"That the sheriff in all cases, whether begun by indictment or information shall be entitled to a guard fee of no more nor less than \$2.00 for each prisoner lawfully committed to jail."

"Whereas the opinion limits the guard fee to following instances:

"In all felony cases whether convicted or not."

"In all arrests under indictment whether convicted or not."

"In all other cases where conviction follows arrest."

"We have had the impression that Act #483 was intended to secure immediate payment of the \$2.00 to which the sheriff was entitled to when the prisoner was sentenced to the penitentiary.

"Up until the passage of this Act, the Department of Corrections and Institutions under authority of Title 45, Section 69, was only authorized to pay one dollar and the remaining one dollar was recognized as a claim against the Fine & Forfeiture Fund of the County.

"We would appreciate your opinion as to the legislative intent of this Act, at your earliest convenience."

You have called my attention to certain errors appearing in an opinion of this office to Hon. J. A. Hill, Sheriff, Clarke County, under date of August 29, 1947. The errors in said opinion were due to the fact that

I did not consider Act No. 483, General Acts 1945, page 721, approved July 7, 1945.

I hereby withdraw and overrule said opinion and substitute therefor the following:

Your request for an official opinion, bearing date of June 24, 1947, is as follows:

"I am a newly elected sheriff and am desirous of charging the correct fees and would appreciate your help by an official opinion on the following.

"In county court when a defendant is charged with non-support and his case is Nolle Prossed or discharged, can the Sheriff's cost be charged to the County Fine and Forfeiture Fund?

"When a defendant arrested for a felony, committed to jail on Justice of Peace Warrant and several days later taken before the Justice for a preliminary trial which results in the defendant being bound over to Grand Jury and is taken back to jail, can an additional guard fee be charged in case defendant is convicted under Title 45, Section 69 of the Code of 1940? In the event of acquittal, can said guard fee be charged against the County Fine and Forfeiture Fund?"

Two questions are posed in your inquiry, and I shall answer them in the order in which they appear.

Title 14, Section 437, Subdivision 8, Code of Alabama 1940, is the section under which one may be prosecuted for non-support, and is as follows:

"(8) Any able-bodied person who shall abandon his wife and children, or either of them without just cause, leaving her of them without sufficient means of subsistence, or in danger of becoming a public charge."

This is a prosecution for vagrancy and is a misdemeanor. The sheriff's costs attach to this offense the same as they do in all other misdemeanor cases, and are payable as all sheriffs' costs in other misdemeanor cases. Cf. Biennial Report of Attorney General, 1934-36, page 655. The sheriff's costs in such cases are payable as provided in Title 11, Section 83, Code of Alabama 1940.

Answering your second inquiry, I call your attention to Act No. 483, General Acts 1945, page 721, approved July 7, 1945, relating to the guard fees of sheriffs, and provides as follows:

"Section 1. That the Sheriff in all cases, whether begun by indictment or information, shall be entitled to a guard fee of no more nor less than \$2.00 for each prisoner lawfully committed to jail.

"Section 2. If the prisoner is convicted and sentenced to the penitentiary or to perform hard labor, the guard fee as provided in the preceding section shall be paid in full out of the convict fund by warrant of the State Comptroller, or like officer; otherwise said guard fee shall be paid out of the county fund from which other sheriff's costs as in cases of acquittal are paid. No part of said guard fee shall be paid out of the county fund if the prisoner is convicted and sentenced to the penitentiary or to perform hard labor.

"Section 3. All laws or parts of laws in conflict with this act or any provision thereof be and the same are hereby expressly repealed."

This act repeals, in part, Title 11, Section 100, Code of Alabama 1940, in that the sheriff is now entitled to a guard or turn-key allowance each time a prisoner is lawfully committed to jail and without reference to whether the charge is brought by indictment or information, or whether the charge is a felony or a misdemeanor. Of course, if the defendant is discharged, a nol-pros is entered, or the State fails to convict, such fees of the sheriff would be payable from the fine and forfeiture fund of the county. Quarterly Report of Attorney General, Vol. 29, page 13.

However, if the defendant is convicted and sentenced to the penitentiary, or sentenced to perform hard labor, it is my judgment that the guard fee should be paid out of the funds of the Department of Corrections and Institutions or out of the "convict fund." See Section 2 of Act No. 483, supra.

It may be argued that since Act No. 57, General Acts 1945, page 58, approved June 1, 1945, provides only for the payment of a \$1.00 guard fee out of the convict fund, such section is in conflict with the provisions of Section 2 of Act No. 483, supra. However, Act No. 57, supra, was approved June 1, 1945, while Act No. 483, supra, was approved July 7, 1945. The act last passed (No. 483, supra) would control in the event there is a conflict. It is also pointed out that the guard fee allowed to the sheriff under Act No. 483, supra, is a charge against the convict fund as soon as the prisoner is convicted and sentenced to the penitentiary or sentenced to perform hard labor. Neither is it required as a condition precedent that the convict be delivered to the penitentiary before the guard fee is allowed by Act No. 483, supra, or payable. All that is necessary under Act No. 483, supra, is that the prisoner be convicted and sentenced to the penitentiary, or convicted and sentenced to perform hard labor.

Since the sheriff is entitled to a guard allowance each time a prisoner is lawfully committed to jail, in the specific case outlined in your question 2, and provided the defendant is convicted and sentenced, you would be

entitled to two guard fees of \$2.00 each. See Quarterly Report of Attorney General, Vol. 18, pages 84 and 86.

It cannot be said that such fees are required to be paid by Title 45, Section 69, Code of Alabama 1940, or the amendment thereto, Act No. 57, General Acts 1945, page 58, approved June 1, 1945. They are payable by virtue of Act No. 483, supra, but nevertheless, such fees are payable from the convict fund.

Very truly yours,

A. A. CARMICHAEL,
Attorney General.

December 30, 1947.

Hon. Ralph P. Eagerton,
Chief Examiner of Public Accounts,
CAPITOL.

Department of Finance—Director of Finance—Division of Purchases and Stores—Purchasing Agent—Merit System—Contracts.

1. Under Title 55, Chapter 4, Articles 1-6, Sections 60-155, Code of Alabama 1940, the Director of Finance, with the approval of the Governor, may assign to himself the functions and duties of purchasing all personal property (with one exception not here material) and of making and supervising the execution of all contracts and leases for the use or acquisition of any personal property, which functions and duties are normally exercised by the purchasing agent, through the Division of Purchases and Stores of the Department of Finance; and such purchases, contracts, and leases made by him are legal.

2. The statutory provisions, supra, do not invest the Director of Finance with authority to abolish the Division of Purchases and Stores of the Department of Finance; and a vacancy existing in the office of purchasing agent, the officer designated by law to head the Division of Purchases and Stores, must be filled by the Director of Finance, with the approval of the Governor, pursuant to the provisions of the Merit System Law. Title 55, Chapter 9, Sections 293-327, Code of Alabama 1940, as amended.

Opinion by the Attorney General.

Dear Sir:

Your request for an official opinion, dated November 19, 1947, is as follows:

"You are respectfully requested to advise me on the present status of the office of Purchasing Agent, Title 55, Section 108, Code of 1940.

"Title 55, Section 65, from which I quote 'All functions and duties of the department of finance shall be exercised by the director of finance, acting by and through such administrative divisions or such officers as he may designate.'

"Title 55, Section 68, prescribes rules and regulations of the Department of Finance which includes 'and shall not be in conflict with applicable statutes.'

"Title 55, Section 72. 'The director of finance shall, subject to the provisions of the merit system, have the right to appoint any employee in the department. All employees and officers of the department of finance, including the chiefs of divisions, shall be subject to the merit system.'

"Title 55, Section 108, from which I quote: 'There shall be in the department of finance the division of purchases and stores, which shall be headed by and be under the direction, supervision and control of an officer who shall be designated the purchasing agent,' and from same section I further quote 'To make and supervise the execution of all contracts and leases for the use or acquisition of any personal property.'

"The office of purchasing agent is at the moment vacant, no successor having been appointed to fill vacancy which was created through provisional appointee not being eligible for permanent appointment due to his position on the recently established roster of the personnel department.

"Title 55, Section 70, reads as follows: 'With the approval of the governor, the director of finance may create and establish such additional division or divisions as may be determined to be necessary or convenient in the efficient and expeditious performance of the functions and duties of the department of finance and assign functions and duties for such division or divisions, and he may, with the approval of the governor, reassign functions and duties as between existing divisions. Chiefs of such new divisions shall be appointed by the director of finance with the approval of the governor, subject to the provisions of the merit system.'

"Could the authority contained in this Section 70 be interpreted as authorizing the suspension of requirements of Section 72, or would Section 68 intervene?

"Under the circumstances recited what is the legal aspects of purchases and contracts made without a duly constituted purchasing agent, would such purchases and contracts be valid?

"Your immediate and preferred attention to this request is earnestly desired as my responsibility under provisions of Section 15, Paragraph 11, of Act No. 351, approved August 14, 1947, requires reporting by me to the Legislative Committee on Public Accounts every expenditure or contract found to have been made in violation of law."

The answers to the questions presented by your letter of inquiry are found in the applicable statutory law of this State, which I will now consider.

The Department of Finance was created by the Department of Finance Act of 1939 (Act No. 112, General Acts 1939, page 144), which act was brought forward and codified in the Code of Alabama 1940, as Title 55, Chapter 4, Articles 1-7, Sections 60-170, substantially without change. (Statutes enacted since the effective date of the Code of Alabama 1940 have not changed the provisions of the above cited Code sections in respects here material).

I now quote pertinent provisions of the above cited sections of the Code of Alabama 1940:

"Sec. 61. General purpose of department; seal.—There shall be a department of finance, which shall be an executive and administrative department and which shall have general supervision of all matters pertaining to the finances of the state and the departments, boards, bureaus, commissions, agencies, offices, and institutions thereof and, to the extent herein indicated over the finances of the counties, municipal corporations, political subdivisions, and local public bodies in the state, and to furnish the physical facilities, equipment and supplies and, to the extent herein indicated, the personnel for the operation of the state and such departments, boards, bureaus, commissions, agencies, offices and institutions thereof. * * * *"

"Sec. 62. Functions and duties of the department of finance; state insurance.—It shall be the duty of the department of finance to manage, supervise and control all matters pertaining to the fiscal affairs and fiscal procedure of the state, * * * *"

"Sec. 64. The director of finance.—The department shall be headed by and shall be under the direction, supervision and control of an officer who shall be known and designated as the director of finance. The director of finance shall be the chief financial officer of the state and the advisor of the governor and of the legislature in financial matters, and he shall at all times be charged with protecting the financial interests of the state. He shall be responsible to the governor for the administration of the department of finance. * * *." (Emphasis added)

"Sec. 65. Powers of the director of finance and how exercised; restrictions thereon.—All functions and duties of the department of

finance shall be exercised by the director of finance, acting by and through such administrative divisions or such officers as he may designate. He shall have all power and authority necessary or convenient to carry out the functions and duties of the department of finance."

"Sec. 68. Rules and regulations; penalties for violations thereof.—The director of finance shall, with the approval of the governor, establish and promulgate rules and regulations with respect to the manner of performance of all functions and duties of the department of finance, the execution of the business of the department and its relations to and business with the other departments, boards, bureaus, commissions, agencies, offices and institutions of the state, the officers and employees thereof, the counties, municipal corporations, political subdivisions and local public bodies in the state, the officers and employees thereof, and the public, which rules and regulations shall be reasonably calculated to effect the expeditious and efficient performance of such functions and duties and shall not be in conflict with applicable statutes. When approved by the governor, such rules and regulations shall have the effect of law and shall govern all departments, boards, bureaus, commissions, agencies, offices and institutions of the state and the officers and employees thereof, the counties, municipal corporations, political subdivisions and local public bodies in the state, the officers and employees thereof, and the public, in their respective relations to and business with the department of finance. Compliance with any such rules or regulations may be compelled by mandamus. Such rules and regulations may be amended from time to time, with the approval of the governor, * * * *."

"Sec. 70. Additional divisions in the department of finance; assignment of functions and duties.—With the approval of the governor, the director of finance may create and establish such additional division or divisions as may be determined to be necessary or convenient in the efficient and expeditious performance of the functions and duties of the department of finance and assign functions and duties for such division or divisions, and he may, with the approval of the governor, reassign functions and duties as between existing divisions. Chiefs of such new divisions shall be appointed by the director of finance with the approval of the governor, subject to the provisions of the merit system." (Emphasis added.)

"Sec. 72. Appointment of employees.—The director of finance shall, subject to the provisions of the merit system, have the right to appoint any employee in the department. All employees and officers of the department of finance, including the chiefs of divisions, shall be subject to the merit system." (Emphasis added.)

"Sec. 108. The division of purchases and stores; the purchasing agent.—There shall be in the department of finance the division of purchases and stores, which shall be headed by and be under the

direction, supervision and control of an officer, who shall be designated the purchasing agent, to be appointed by the director of finance, with the approval of the governor. The functions and duties of the division of purchases and stores shall be as follows: To purchase all personal property, except alcoholic beverages (which shall continue to be purchased by the alcoholic beverage control board) for the state and each department, board, bureau, commission, agency, office and institution thereof. To make and supervise the execution of all contracts and leases for the use or acquisition of any personal property. * * * * To perform such other functions and duties of the department of finance as may from time to time be assigned by the director of finance. * * * ." (Emphasis added.)

The Division of Purchases and Stores is one of six divisions of the Department of Finance which were created by the Department of Finance Act of 1939 and which were provided for in the codification of said act in the Code of Alabama 1940. It is to be noted that the statutory provisions dealing with each such division, after enumerating the specific functions and duties of the division, contain a provision that each division shall perform such other functions and duties of the Department of Finance as may from time to time be assigned by the Director of Finance. (Acting pursuant to the authority invested in him by Section 70, supra, the Director of Finance, with the approval of the Governor, has created and established certain additional divisions in the Department of Finance, and the Legislature, by Act No. 351, S. 66, General Acts 1947 (Ms.), approved August 14, 1947, has abolished the Division of Examiners of Public Accounts of the Department of Finance and has created in lieu thereof a Department of Examiners of Public Accounts.)

Thus, it can be seen that the legislature has created the Department of Finance, to be headed by and to be under the direction, supervision and control of the Director of Finance, who is invested with all the power and authority necessary or convenient to carry out the functions and duties of the Department of Finance, including the creation and establishment, with the approval of the Governor, of such additional divisions as may be determined to be necessary or convenient in the efficient and expeditious performance of the functions and duties of the department, the assignment of functions and duties to such divisions, and the reassignment of functions and duties as between existing divisions. (It is to be noted, however, that he does not have the power and authority to abolish a division of the department which was created by statute, the legislature having reserved this authority for itself, as was its prerogative.) Under the statutes governing this department, the Director of Finance has full and final responsibility for the discharge of all of the functions and duties of the department, with power and authority commensurate with his responsibility. Although in discharging this responsibility, he, of necessity, usually acts through duly appointed officers, agents, or employees, their authority stems from him, they act in his behalf, and their official acts are subject to being affirmed or reversed by him. He is invested with all the power and authority of his subordinates, and may reassign the functions and duties of any particular

division in his department in such a manner as his best judgment dictates, giving the functions and duties so reassigned to another division or discharging them himself, though such reassignment must be with the approval of the Governor.

Consequently, I am of the opinion that the Director of Finance has the authority, with the approval of the Governor, to withdraw from the Division of Purchases and Stores of the Department of Finance the normal functions and duties of purchasing all personal property (with an exception not here material) and making and supervising the execution of all contracts and leases for the use or acquisition of any personal property and reassign such functions and duties to himself, as Director of Finance. Such appears to be the unmistakable intention of the legislature in enacting the Department of Finance Act of 1939, *supra*, and in codifying it without substantial change as the section of the Code of Alabama 1940 referred to and quoted from hereinabove.

It follows that such purchases, contracts, and leases made by him are legal. It is fundamental that the State, as an incident to the general right of sovereignty, may, within the sphere of the political powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the proper exercise of those powers. *United States v. Tingey*, 5 Pet. 115, 8 L. Ed. 113; *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277.

As stated above, while the Director of Finance, with the approval of the Governor, may reassign functions and duties as between existing divisions in his department, he may not abolish any division of the department which was created by the legislature.

The statutes dealing with the Division of Purchases and Stores provide that it shall be headed by and be under the direction, supervision and control of an officer, who shall be designated the purchasing agent, to be appointed by the Director of Finance, with the approval of the Governor, but subject to the provisions of the merit system. (The Merit System Law is found in Title 55, Chapter 9, Sections 293-327, Code of Alabama 1940, as amended.)

It is well settled that "the law abhors vacancies in public offices, and great precautions are taken to avoid their occurrence." See Quarterly Report of Attorney General, Vol. 46, page 32, and authorities therein cited. Consequently, the Director of Finance, with the approval of the Governor, should proceed to fill the vacancy now existing in the office of purchasing agent. I understand that an appropriate eligible register for such position or office has been established pursuant to the provisions of the Merit System Law. Accordingly, a purchasing agent should be appointed from such eligible register. See Section 307, *supra*.

The purchasing agent so appointed will head the Division of Purchases and Stores, and it will be under his direction, supervision and

control, subject, of course, to the superior power and authority of the Director of Finance. The division, under his direction, supervision and control, will discharge the functions and duties normally assigned to it (see Sections 108-144, supra), less such of those functions and duties as are reassigned by the Director of Finance, with the approval of the Governor, to himself or to some other division of the department, and, in addition, such other functions and duties as may be assigned to it by the Director of Finance, with the approval of the Governor.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 30, 1947.

Hon. S. B. Godwin,
Secretary-Treasurer,
State Board of Embalming,
Clayton, Alabama.

Boards—Surplus Funds—State board of Embalming established under Title 46, Section 121, Code of Alabama 1940, not authorized to expend surplus funds for conducting clinics for the embalmers throughout the State and for other educational programs.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for an official opinion, bearing date of October 27, 1947, is as follows:

"The Embalmers Board of the State of Alabama functions under the provisions of Title 46, Chapter 6, Sections 121-128, Code of Alabama 1940. The Board has in its special fund a surplus over and above that necessary to pay its usual operating expenses.

"Please advise if this surplus money may be used for conducting clinics for the embalmers throughout the State, and for other educational programs."

In my opinion, your question should be answered in the negative. I have been unable to find any expressed or implied authority for the Board to expend the surplus funds as outlined in your request. Title 46, Section 127, Code of Alabama 1940, provides, in part, as follows:

"§ 127. Annual dues.— * * * * * All expense, salary, and per diem to members of this board shall be paid from fees received under the provisions of this chapter and shall in no manner be an expense to the state. All moneys received in excess of said per diem allow-

ance and other expenses provided for, shall be held by the said board as a special fund for meeting the expenses of said board."

From the above, it is my opinion that the surplus funds may only be used for meeting the expenses of the Board. In your request you stated that the Board has a surplus over and above that necessary to pay its usual operating expenses. It might be necessary for the Board to incur extraordinary expenses in performing some of its duties. Title 46, Section 124, Code of Alabama 1940, provides, in part, as follows:

"§ 124. Powers and duties of the board.— * * * * * To hear and try charges against any licensed embalmer for incompetency, immorality, drunkenness or any offense involving moral turpitude, and to revoke the license of any person found guilty of such offense."

I do not believe it would be unreasonable to assume that a long hearing under the section, supra, might deplete the Board's surplus.

The State Board of Embalming, being a creature of statutory creation, has no powers other than those conferred by the statute creating it.—Quarterly Report of Attorney General, Vol. 20, page 42.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 30, 1947.

Hon. R. J. Westbrook,
Judge of Probate,
Marengo County,
Linden, Alabama.

License—War Veteran—Exemption.

Under the provisions of Act No. 698, General Acts 1947, approved October 13, 1947, a war veteran operating a "rolling store" and selling tobacco products is exempt from the license tax required for the privilege of selling tobacco products.

Opinion by Assistant Attorney General Culverhouse.

Dear Sir:

Your request for an official opinion, bearing date of October 7, 1947, is as follows:

"Please advise me as to whether a War Veteran is exempt from the payment of tobacco license in connection with the operation of a Rolling Store?"

It is my opinion that a war veteran, who qualifies under the provisions of Act No. 698, General Acts 1947, approved October 13, 1947, is exempt from the payment of tobacco license even though such tobacco products are sold from a "rolling store."

It was held in the case of *Harris Brothers v. State*, 240 Ala. 160, 198 So. 443, that if the operator of a "rolling store" sold tobacco products, he must pay the maximum license for the privilege of selling tobacco products in addition to the license required for the operation of a "rolling store." It will be noted that these licenses are two distinct and separate licenses. The tobacco license is levied in accordance with Title 51, Section 484, Code of Alabama 1940, and the license required for the privilege of operating a "rolling store" is in accordance with Title 51, Section 611, Code of Alabama 1940.

Section 1 of Act No. 698, supra, reads as follows:

"Section 1 of Act 353, approved July 6, 1945, which relates to exemptions of veterans from business or occupational license taxes, is amended to read: 'Section 1. Every bona fide permanent resident of the State of Alabama who has served 90 days or more in the armed forces of the United States between September 16, 1940, and the termination of World War II by the signing of a definite treaty of peace shall, upon sufficient identification, and upon sufficient proof of being a permanent resident of this State, and upon the production of an honorable discharge from or other proof of the honorable termination of such service, be exempt from business or occupational license taxes for a period of six years after the effective date of this act or for a period of six years after his or her discharge from or termination of service, whichever is later, to the extent and subject to the conditions herein specified.' No exemption, however, shall be allowed any such person from the license tax on what commonly are known as rolling stores; nor shall the exemption herein granted be construed as relieving any person from the payment of any license tax for the registration or operation of any motor vehicle." (Emphasis added).

The above act grants war veterans an exemption from business and occupational license taxes. This exemption includes the tobacco license tax. However, the act specifically denies this exemption to the license tax required for operating "rolling stores." Therefore, it is my opinion that a veteran will be required to pay the license tax for the privilege of operating a rolling store, but the act does not deny the exemption from other business and occupational license taxes when such licenses are required in addition to the one for the operation of a rolling store.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 30, 1947.

Hon. John E. Mandeville,
Clerk, Circuit Court,
Mobile County,
Mobile, Alabama.

Department of Corrections and Institutions—Costs and Fees—
Escapes—Clerks of the Circuit Court.

1. Even though a prisoner has escaped from jail after conviction and sentence to the penitentiary, the clerk of the circuit court should notify the Director of the Department of Corrections and Institutions as to the jail wherein the convict was confined, and forward a copy of the judgment and sentence to the Department of Corrections and Institutions. There is no reason why the department should not retain such papers. Title 45, Section 26, Code of Alabama 1940.

2. The clerk of the circuit court may forward a cost bill to the Department of Corrections and Institutions for those costs payable under Title 45, Section 69, Code of Alabama 1940, but such costs will not be paid until the prisoner is delivered to the penitentiary officials. There is no reason why the Department of Corrections may not retain the cost bill until that time.

3. The fee of the sheriff for guarding prisoners under Act No. 483, General Acts 1945, page 721, approved July 7, 1945, not dependent upon delivery of convict to the penitentiary.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of October 20, 1947, is as follows:

"Your opinion is requested in reference to the following questions:

"John Doe was convicted on August 18, 1947, in the Circuit Court of Mobile County, Alabama, of the offense of Grand Larceny and sentenced to the penitentiary of the State of Alabama for the term of two years. On 18 August 1947 this office forwarded pursuant to Title 45, Section 26, Code of Alabama 1940, a copy of the judgment entry and sentence in the case, to-wit, a mittimus. At the same time in conformity with Title 45, Section 69, Code of Alabama 1940, a penitentiary cost bill in this same case was forwarded to the Department of Corrections and Institutions. While the Defendant was being held in the Mobile County jail awaiting the arrival of the Transfer Agent, he escaped and as yet has not been apprehended. As you know, if the Defendant is apprehended this office would have no official knowledge of it because the Sheriff already has a

copy of the judgment entry and sentence in this case in his file and after the re-arrest would not necessarily have to notify this office.

"Question No. 1—Is it the duty of this office to retain the Department of Corrections and Institutions copy of the judgment entry and sentence in the case, to-wit, a mittimus or should the same be retained by that Department?

"Question No. 2—Is it the duty of this office to retain the Department of Corrections and Institutions penitentiary cost bill or should the same be retained by that Department?

"The writer understands that the Department of Corrections and Institutions is not liable for the costs of conviction under Title 45, Section 69, Code of Alabama of 1940 until the defendant is re-arrested and taken into custody by the Department of Corrections and Institutions or one of its Transfer Agents.

"Of course, in a spirit of cooperation this office will be glad to notify the Department of Corrections and Institutions in the event knowledge comes to the undersigned that the Defendant has been re-arrested."

In answer to your question No. 1, you are advised that it is the duty of the circuit clerk, after conviction and sentence to notify the Director of the Department of Corrections and Institutions as to the jail where the convict is confined, and forward the Director copy of the judgment entry and sentence in the case. Title 45, Section 26, Code of Alabama 1940.

In the case outlined in your inquiry, where the convict has escaped from the jail before his delivery to the transfer agent, I see no reason why the clerk should not advise the Director the jail in which the convict was held before his escape, and I see no reason why the clerk should not also forward a copy of the mittimus and the judgment entry and sentence of the court to the Director. It may be noted on the papers which the clerk sends to the Director that the convict has escaped.

If, at the time of the escape, the clerk has already sent those papers required by Title 45, Section 26, Code of Alabama 1940, to the Director, there is no reason why the Department of Corrections and Institutions should not retain these papers until the convict is apprehended.

In answer to your question No. 2, I find no objection to your forwarding a copy of the Department of Corrections and Institutions' penitentiary cost bill to that department, even though the convict has escaped. Title 45, Section 69, Code of Alabama 1940, requires certain costs to be paid by the Convict Department, but only when a convict has been delivered to penitentiary officials. Title 45, Section 72, Code of Alabama 1940. The department would, of course, retain the cost bill until the prisoner had

been delivered to its representative, and, of course, the cost bill would not be paid until that time.

Act No. 483, General Acts 1945, page 721, approved July 7, 1945, authorizes the payment of guard fees to the sheriff by the Department of Corrections and Institutions, whether or not the convict is delivered to the penitentiary officials. The costs provided for in that act are a charge upon the Department of Corrections and Institutions, whether or not the prisoner is delivered to the penitentiary.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 31, 1947.

Hon. O. L. Andrews,
Clerk, Circuit Court,
Tenth Judicial Circuit,
Birmingham, Alabama.

Probation—Clerks—Restitution of value of stolen property.

When defendant is convicted of crime of larceny, or other related crimes enumerated in Title 14, Section 376, Code of Alabama 1940, and value of stolen property is assessed and defendant placed on probation on condition that he pay costs, said condition imposes on defendant the duty to pay value of property as an item of cost, and circuit clerk should assess value of property in bill of costs. Title 42, Sections 19, et seq., Code of Alabama 1940.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion bearing date of October 30, 1947, is as follows:

"Will you please give me an opinion as to whether or not the Clerk is to tax the value of the property in a cost bill when the defendant is placed on probation and is required to pay the cost.

"Title 14-336 makes it mandatory that the Clerk tax the value of the property in a cost bill, but of course this law was written long before the probation law was ever heard of. A defendant is placed on probation and the value of the property is fixed by the Court and nothing in the order states the property was restored to the owner. Would or would not the Clerk be required to tax the value of the property in the cost bill where the defendant is paying the cost of the Court in a case in which he has been probated? In

other words, if he is paying the costs in the case would he be required to pay the amount of the property assessed, and would this be included as part of the cost?

"I would appreciate your prompt attention to this."

In my judgment, the clerk is required to tax the value of the property in the cost bill, and collect same from the defendant, when the value of the property has been fixed by the court, justice, or jury. This should be done even though the defendant has been placed on probation and required to pay costs.

Title 14, Section 336, Code of Alabama 1940, referred to in your inquiry, requires the justice, the court, or the jury trying certain cases involving larceny, to assess the value of the property. This section further provides that the value so assessed shall be made an item of cost in the case, and shall be paid in like manner as other costs taxed against the defendant. This section also requires the clerk to issue a certificate to the owner of the property for the value of the property as assessed by the court or jury.

In my judgment, when a defendant is placed on probation, under the provisions of Title 42, Sections 19, et seq., Code of Alabama 1940, and the court requires as a condition of probation the payment of costs (Title 42, Section 22, Code of Alabama 1940), such condition requiring the payment of costs by the defendant includes the assessed value of the property made under the provisions of Title 14, Section 336, Code of Alabama 1940.

When the assessment appears in the judgment entry, or appears of record, it is the clerk's duty to list such item in the bill of costs, and collect such costs as other costs are collected from the defendant, and pay over the amount to the person holding the certificate.

In my judgment, the probation Act, Title 42, Sections 19, et seq., Code of Alabama 1940, was not intended to relieve the defendant of this obligation.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 31, 1947.

Hon. James E. Folsom,
Governor of Alabama,
CAPITOL.

Boards of Registrars—Mobile County.

Act No. 454, General Acts 1935, page 981, Act No. 262, General Acts 1943, page 233, Act No. 263, General Acts 1943, page 234,

Title 17, Article 3, Code of Alabama 1940, Title 62, Section 37, Code of Alabama 1940.

1. The Board of Registrars of Mobile County is required to visit the precincts of the county as prescribed by Act No. 262, General Acts 1943, page 233.

2. The presentation of a veteran's discharge alone is not, in itself, sufficient evidence of residence to make it mandatory that the board of registrars register the applicant presenting such discharge.

3. Boards of registrars may prescribe such working hours as are reasonable and best designed to effect the expedient registration of voters.

4. In case of charges of malfeasance in office by registrars, such charges should be addressed to the appointing board established by Title 17, Section 21, Code of Alabama 1940.

Opinion by the Attorney General.

Dear Sir:

The request for official opinion submitted by you, the State Auditor, and the Commissioner of Agriculture and Industries under date of December 5, 1947, is as follows:

"We, the members of the Appointing Board for Registrars, would like to get your opinion on the following questions, which have been raised with regard to the Board of Registrars of Mobile County:

"1. Does the Board have to visit the respective beats in the County as set out in Section 28 of Title 17 or does Section 37 of Title 62 supersede this?

"2. Is the presentation of a veterans discharge sufficient evidence of residence to entitle him or her to register?

"3. Are there any legal requirements as to the hours and time of day that the Registrars shall be open for registration?

"4. Can the Board set any reasonable hours during day or night?

"5. In case of charges of malfeasance in office by members of the Board of Registrars to whom and by whom should these charges be presented?"

The answer to your first inquiry is dependent upon a determination of the provisions of law now applicable to Mobile County.

The general law of the State with regard to regular sessions held by boards of registrars of the various counties for the registration of voters is found set out in Title 17, Section 26, Code of Alabama 1940, as amended. The general law of the State relative to special registration is found in Title 17, Section 27, Code of Alabama 1940, as amended. Prior to the adoption of the Code of Alabama 1940, the general law of the State relative to both regular and special registration of voters was found in the Code of Alabama 1940, Sections 375 and 376, respectively.

The 1935 session of the Legislature enacted a general law with local application, Act No. 454, General Acts 1935, page 981, which law was, by its express terms, applicable to those counties of the State "which may now or hereafter have a population of not less than 100,000 nor more than 300,000 according to the last or any succeeding Federal census." Such act provides as pertinent as follows:

"Section 1. That in all counties in this State which may now or hereafter have a population of not less than 100,000 nor more than 300,000 according to the last or any succeeding Federal census, the Board of Registrars shall meet at the Courthouse on the first day of each October and hold daily sessions (Sundays and legal holidays excepted) from and including said date through the succeeding February 1st, for the purpose of registering voters. Said board shall also meet on the first Monday of April of each year and remain in session daily for thirty days (Sundays and legal holidays excepted) for the purpose of purging the registration lists and shall again meet each year on the first Monday after the expiration of one week from the expiration of said last mentioned session and shall remain in session daily for six days for the purpose of hearing objections to striking names from the registration lists.

"Section 2. Said sessions of the Board of Registrars in all such counties shall be in lieu of all other sessions now authorized by law."

The provisions of such act were brought forward and incorporated into the Code of Alabama 1940 and are found set out in Title 62, Section 37, thereof.

Figures at hand reveal that the population of Mobile County at the date of the Federal census of 1940 was 141,974 persons. It is, therefore, apparent that Mobile County falls within the population classification set out in such act and was, therefore, subject to the provisions thereof. It might also be noted that such provisions are incorporated into the Code of Alabama 1940 as provisions of law applicable to Mobile County alone.

No question is raised concerning the power and authority of the Legislature to enact this statute, nor do I doubt, or question, their authority and jurisdiction to so enact such legislation. *Johnson v. State ex rel.*, 245 Ala. 499, 17 So. 2d 662; *Talley v. Webster*, 225 Ala. 384, 143 So. 555; *Stand-*

ard Oil Company v. Limestone County, 220 Ala. 231, 124 So. 523; Polytinsky v. Wilhite, 211 Ala. 94, 99 So. 843.

In view of the above, it is my opinion that Act No. 454, supra, was validly enacted, that the provisions thereof were applicable to Mobile County, and that the purpose and effect of such act was to remove Mobile County from the operation of the general law governing the registration of voters.

By Act No. 262, General Acts 1943, page 233, the Legislature rewrote the general law of the State relative to the holding of regular sessions by the boards of registrars for the registration of voters. This act provides as follows:

"Section 1. That Section 26, Title 17, Code of Alabama of 1940, be and the same is hereby amended so as to read as follows: The board of registrars in each county shall visit each precinct at least once and oftener if necessary between October first and December thirty-first, 1939, and each two years thereafter, to make a complete registration of all persons entitled to register, and shall remain there at least one half a day. They shall give at least twenty days' notice of the time when, and the place in the precinct where they will attend to register applicants for registration, by bills posted at three or more public places in each election precinct, and by advertisement once a week for three consecutive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice or to attend any appointment made by them in any precinct, they shall, after like notice, fill new appointments therein. The time consumed by the board in completing such registration shall not exceed thirty working days in any county, except that in counties having more than three hundred thousand population as shown by the last preceding census, the time shall not exceed seventy-five working days. The board of registrars in each county shall meet at the court house on the third Monday in January, 1940, and each two years thereafter and shall remain in session ten working days for the registration of voters.

"Section 2. That all laws, local, special or general, in conflict herewith are hereby repealed.

"Section 3. This act shall become effective upon its passage and approval by the governor."

Consideration must now be given that provision of the above act providing "That all laws, local, special or general, in conflict herewith are hereby repealed," and it must be determined whether or not such acts as a repeal of the act of 1935 applicable to Mobile County, Act No. 454, supra, which was codified as Title 62, Section 37, supra.

In giving answer to this question, I am guided and controlled by former opinions of the Supreme Court of Alabama, which Court has, on

numerous occasions, considered the office of a repealing clause such as that here considered.

In the case of *Tucker v. McLendon*, 210 Ala. 562, 98 So. 797, the Court held that:

"A repealing clause will be given effect according to its express terms, even to the repeal of a special or local law. *Maxwell v. State*, 89 Ala. 150, 7 South. 824; *State ex rel. Bibb v. Town of Warrior*, 181 Ala. 642, 62 South. 69."

In that case, the Court considered a repealing clause which read as follows:

"That all laws and parts of laws, local, general, or special in conflict with the provisions of this act be, and the same are hereby repealed."

In its opinion, the Court said:

"This covers, in legal terms, every clause of legislation known to our Constitution except private laws, not pertinent to this inquiry. Constitution of 1901, §110.

"In *Maxwell v. State*, 89 Ala. 150, 7 South. 824, a case dealing with a similar repealing clause, it was said: 'The office of construction is to ascertain what the language of an act means, and not what the Legislature may have intended.'

"Again quoting from Lord Campbell: 'It is far better that we should abide by the words of a statute, than seek to reform it according to the supposed intent.'

"See also *State ex rel. Bibb v. Town of Warrior*, 181 Ala. 642, 62 South. 69."

In the case of *Davis v. Browder*, 231 Ala. 332, 165 So. 89, the following statement of the Supreme Court is found:

"That the act of September 2, 1935, was intended and designed to apply to every county in the state is further borne out by the fact that by section 16 of the act, it is expressly provided: 'All laws and parts of laws, general, special or private, in conflict with the terms and provisions of this Act are hereby repealed.'

"The office of a repealing clause has had, on many occasions, the consideration of this court. It furnishes a valuable aid in ascertaining what the language of the act under consideration really means; and not what the Legislature may have intended. It certainly makes clearer the intention of the Legislature to repeal laws in conflict with the law to which this repealing clause is attached. *Tucker*

v. McLendon et al., 210 Ala. 562, 98 So. 797; Maxwell v. State, 89 Ala. 150, 7 So. 824; State ex rel. Bibb v. Town of Warrior, 181 Ala. 642, 62 So. 69."

Still later, in the case of Heck v. Hall, 238 Ala. 274, 190 So. 280, the court, in considering the Merit System Act, wrote as follows:

"It is to be noted that the Merit System Act carries with it the following repealing clause: 'All laws or parts of laws inconsistent or in conflict with this Act are hereby expressly repealed, subject to the provisions of Section 40 hereof. Specifically and again without limiting the generality of the above, all laws or parts of laws the effect of which is to prescribe a different method of selection or appointment or to fix terms of office or employment and rate of compensation for services contrary to the express or implied effect and provisions hereof are repealed, it being the legislative intent that the terms of this Act shall be fully effective, any law or parts of laws heretofore enacted to the contrary notwithstanding.'

"'A repealing clause will be given effect according to its express terms, even to the repeal of a special or local law.' Tucker v. McLendon, 210 Ala. 562, 98 So. 797; Maxwell v. State, 89 Ala. 150, 7 So. 824; State ex rel. Bibb v. Town of Warrior, 181 Ala. 642, 62 So. 69; Fidelity & Deposit Co. of Maryland v. Farmers' Hardware Co. et al., 223 Ala. 477, 136 So. 824; Allgood v. Sloss-Sheffield Steel & Iron Co., 196 Ala. 500, 71 So. 724."

In view of the above authorities, it is my opinion that the repealing clause found within Act No. 262, supra, repeals Act No. 454, supra (Title 62, Section 37, supra), insofar as the provisions thereof conflict.

As noted in the above cases, effect must be given to the expressed intention of the Legislature, and, in my judgment, the Legislature could speak in no more clear or unambiguous language than it has so done, and, hence, there is nothing to construe, and the provisions of Act No. 262, supra, insofar as they conflict with those of Act No. 454, supra (Title 62, Section 37, supra), serve to supersede and repeal such act.

That there is conflict between such acts cannot be seriously questioned. The two acts provide different times for registration, there is a distinct and material difference in the time to be consumed by the boards of registrars in registering voters by virtue of the limiting provision of Act No. 262, supra, and, it might even be argued, different places of registration are prescribed. It is my opinion that the two acts are in irreconcilable conflict and that, therefore, the provisions of Act No. 454, supra (Title 62, Section 37, supra), must fall before the repealing clause of Act No. 262, supra.

In consideration of this question, it is interesting to note the action taken by the legislative delegations of the two other more populous counties of the State, Jefferson and Montgomery, in connection with the

passage of Act No. 262, supra. It will be observed that within the provisions of Act No. 262, supra, is a specific proviso, applicable to Jefferson County alone, allowing the Board of Registrars of that county a total of seventy-five working days to be devoted to the registration of voters. It will also be observed that Montgomery County, which prior to the passage of Act No. 262, supra, operated under a general law with local application with regard to the registration of voters, which law contained provisions decidedly similar to those of Act No. 454, supra, re-enacted such law, with minor changes, at the 1943 session of the Legislature, and thereby again removed Montgomery County from the operation of the general law and established a separate system for the registration of voters in Montgomery County. I fail to find where any such action was, or has later been, taken by the Legislature with respect to Mobile County. It is, therefore, my opinion, and I must so hold, that Mobile County now operates under the general law with regard to the registration of voters, and the Board of Registrars of such county is, therefore, subject to the provisions of Title 17, Section 26, Code of Alabama 1940, as amended by Act No. 262, supra.

It is likewise pertinent to point out that the 1943 session of the Legislature also rewrote the general law of the State with regard to special registration, such being found in Act No. 263, General Acts 1943, page 234. This act rewrote and re-enacted, with minor changes, the provisions of Title 17, Section 27, Code of Alabama 1940. It is significant to note that such act contains the following proviso:

“* * * except that in counties having a population of more than one hundred and ten thousand and not more than one hundred and fifty thousand according to the last or any subsequent federal census this section shall not apply, * * *”

This proviso has the purpose and effect of removing Mobile County from the operation of the provisions of this act, and it is, therefore, my opinion that the Board of Registrars of Mobile County cannot validly hold any special sessions for the registration of voters under the provisions of Title 17, Section 27, Code of Alabama 1940, as amended by Act No. 263, supra.

Having considered and given answer to the above, I will advise in answer to your first inquiry that it is my opinion that the Board of Registrars of Mobile County is required to comply with the provisions of Act No. 262, supra, with reference to visiting the various precincts of the county and that such visits should be advertised and held in conformity with the provisions of such act.

In answer to your second inquiry, it is my opinion that the mere presentation of a veteran's discharge is not, of itself, sufficient evidence of residence to make it mandatory on the board of registrars to register the applicant presenting the discharge. In this regard, I call your attention to the following sections of Title 17, Code of Alabama 1940, governing the registration of voters:

"§31. Examination and oath of applicants to register.—The board of registrars shall have power to examine, under oath or affirmation, all applicants for registration, and to take testimony touching the qualifications of such applicants. Each member of such board is authorized to administer the oath, to be taken by the applicants and witnesses, which shall be in the following form and subscribed by the person making it, and preserved by the board, namely: 'I solemnly swear (or affirm) that in the matter of the application of _____ for registration as elector, I will speak the truth, the whole truth, and nothing but the truth, so help me God.'"

"§33. Applicants may be refused.—Any person making application to the board of registrars for registration who fails to establish by evidence to the reasonable satisfaction of the board of registrars that he or she is qualified to register, may be refused registration."

"§43. Applicant for registration to make oath required.—Any applicant for registration may be required to state under oath to be administered by the registrars, or any person authorized by law to administer oaths, where he or she lived during the five years next preceding the time he or she applied to register, and the name or names by which he or she was known during that period, and the name of his or her employer or employers, if any, during such period. Any applicant for registration who refuses to state such facts, or any of them, shall not be entitled to register."

In view of these provisions, it is my opinion that if it is the desire of the board of registrars that the applicant furnish further evidence of his residence qualifications, he may be called upon to do so by the board.

In answer to your third and fourth inquiries, you are advised that research does not reveal any legal requirements as to the hours and time of day that the boards of registrars shall be open for registration.

Title 17, Section 53, Code of Alabama 1940, provides as follows:

"The board of registrars may make such rules and regulations as it deems proper for the receipt of applications for registration and the accomplishing in as expedient a manner as possible the registration of those entitled to register, but no person shall be registered until a majority of the board of registrars has passed favorably upon such person's qualifications."

It is my opinion that, in view of the authority here vested in boards of registrars, such boards may prescribe such hours of duty as are reasonable and will best effect the expedient registration of voters. It is my further opinion that such hours of duty may be either in the day time or night time, or in both day time and night time.

In this connection, I also call your attention to the provisions of Title 17, Section 34, Code of Alabama 1940, which prescribes that:

"The action of a majority of the board of registrars shall be the action of the board, and a majority of the board shall constitute a quorum for the transaction of all business."

It is, therefore, apparent that any session must be held by and with the consent of a majority of the board and with a quorum of the board in attendance, as nothing done by any individual member has any force and validity until approved and adopted by a majority of the board. Biennial Report of Attorney General, 1920-22, page 15.

In answer to your fifth and last inquiry, it is my opinion that in case of charges of malfeasance in office by members of the boards of registrars such charges should be addressed to the appointing board, which is constituted under the authority of Title 17, Section 21, Code of Alabama 1940, and is composed of the Governor, the State Auditor and the Commissioner of Agriculture and Industries.

The authority of such appointing board to remove registrars from office is set out in Title 17, Section 22, Code of Alabama 1940, and is as follows:

"The registrars so appointed under this article may be removed at the will of the appointing board, or a majority of the members thereof, at any time, with or without cause, and without giving their reasons therefor; and if not so removed, the registrars may hold office for four years from the time of their appointment and until their successors are appointed."

It is significant to note the broad power of the appointing board with respect to the removal of registrars, it being provided that the board, or a majority thereof, may, at any time, with or without cause, remove any registrar. It is, therefore, my opinion that charges of malfeasance in office should be addressed to this appointing board for their action and disposition.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

December 31, 1947.

Hon. Jno. B. Sockwell, Chairman,
Court of County Commissioners,
Colbert County,
Tuscumbia, Alabama.

Counties—Courts of County Commissioners—Statutes—Constitutionality—Construction.

1. Act No. 184, Local Acts 1945, page 101, which act divides Colbert County into Commissioners' Districts, does not violate

Constitution of Alabama 1901, Sections 45, 104(29) and 105.

2. Statutory provisions of local act requiring that candidate for County Commissioner shall have resided in district "for two years prior to the time he qualifies for such office" held to mean two years immediately prior to the time he qualifies for such office.

Opinion by Assistant Attorney General Gallion.

Dear Sir:

Your request for an official opinion, bearing date of October 10, 1947, is as follows:

"The Court of County Commissioners of Colbert County desires a ruling from your office upon the validity and constitutionality of the local act of the Legislature of Alabama approved June 23, 1945 (Acts of 1945, page 101) entitled:

"AN ACT

"To divide Colbert County, Alabama into four (4) Commissioner's Districts.—To define the boundaries thereof, and to provide for the survey and establishment of permanent boundaries to such Commissioner's District and to provide for the election of the members of the Board of Revenue, or other governing body, for said County by qualified voters of Colbert County for each of such Commissioner's Districts; to provide that a member from each district shall be nominated and elected by the qualified voters of the entire County of Colbert.

"Our County Attorney states that in his opinion this local act is invalid and unconstitutional in view of section 45 of the Constitution of Alabama. He points out that there are several provisions of the act that are not clearly expressed in the title.

"We call attention that the act provides for a primary election and that the Commissioner is to be nominated at a primary election whereas the title to the act does not in any manner indicate that the various political parties must hold a primary election for the nomination of candidates, and it does seem to us that the title of the act is not broad enough to authorize a provision in the act to govern the political parties in the nomination of candidates.

"We suggest that all the provisions of section 3 and section 4 are unauthorized by the title to the act. It is nowhere hinted in the title of the act that the act fixes qualifications for becoming a candidate for or holding the office of Commissioner. You will note that the act goes so far as to prescribe that the candidate must have been a bona fide resident of a certain district for two years prior to the

time he qualifies for the office and that he shall reside within the boundaries of his respective district during his entire term of office and that if he violates this requirement he would automatically lose his office, and this act also provides for the tenure of the office. The only reference to the election made in the title either expressly or impliedly is restricted by the title to the provision that the voters of the entire County shall participate in the election and that a Commissioner shall be elected for each Commissioner's District, and when this manner of election is provided for in the act, that is as far as the act can go in regulating the election. The language of the title is too restricted to authorize the act to provide for the election in general or to provide for qualifications of those who may run for or hold the office or to provide for their impeachment for failing to reside in a particular locality during the term.

"It appears that the title of the act provides for the election of a Commissioner 'for each of such Commissioner's Districts' and that the act itself provides that 'the qualified electors of Colbert County, Alabama, shall elect one County Commissioner for said County of Colbert from each of the above described districts.' There may be a wide difference in being elected for a district and being elected from the district, and it seems that the title of the act and the act itself are not in harmony in this respect.

"This local act may offend subsection 29 of section 104 of the Constitution of Alabama, and it may be violative of section 105 of the Constitution.

"You will note that this act in section 2 places upon the Court of County Commissioners the duty to cause the lines between the districts to be surveyed and permanently established by the erection of certain concrete posts every mile on the lines between the districts. An accurate survey would cost the County thousands of dollars and would require an engineering force several months, and this money and our County Engineering Force are both needed to be used in our program of building farm-to-market roads, and naturally, we want to be sure that this act is valid and constitutional before we undertake to carry out this local act which legislation in our opinion will serve no good purpose.

"The last two lines in section 3 of the act read as follows: 'and who shall have resided in that respective district for two years prior to the time he qualifies for such office.' Please kindly advise us whether the expression 'for two years prior' means two years immediately preceding the time the candidate qualifies or whether the candidate could qualify if he had in the past resided for two years in the district which prior residence was not immediately prior to or next before he qualifies for office."

It is my opinion that the act referred to is constitutional.

Your request for an official opinion questions the constitutionality of the act under consideration under Constitution of Alabama 1901, Sections 45, 104(29) and 105.

Constitution of Alabama 1901, Section 45 reads as follows:

"Sec. 45. The style of the laws of this state shall be: 'Be it enacted by the legislature of Alabama,' which need not be repeated, but the act shall be divided into sections for convenience, according to substance, and the sections designated merely by figures. Each law shall contain but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length."

The title of the act under consideration reads as follows:

"To divide Colbert County, Alabama, into four (4) Commissioner's Districts.—To define the boundaries thereof, and to provide for the survey and establishment of permanent boundaries to such Commissioner's District and to provide for the election of the members of the Board of Revenue, or other governing body, for said County by qualified voters of Colbert County for each of such Commissioner's Districts; to provide that a member from each district shall be nominated and elected by the qualified voters of the entire County of Colbert."

The body of the act, in my opinion, substantially follows the title. Such matters that are contained in the body of the act and are not referred to in the title, I consider to be matters of cognate detail, properly related to the general expression contained in the title. Our Supreme Court has held on numerous occasions that where there is a fair expression of the general subject of the act in its title, "all matters reasonably connected with it, and all proper agencies or instrumentalities, or measures, which will or may facilitate its accomplishment, are proper to be incorporated in the act, and, as usually said, are cognate or germane to the title." *Lindsay v. U. S. Savings etc., Ass'n.*, 120 Ala. 156, 173, 24 So. 171 and cases cited thereunder.

In *Allidridge v. Dunlap*, 240 Ala. 27, 197 So. 36, the Supreme Court further held that the title need not be a complete index or catalogue of all details of a bill.

It is my opinion that the title of the act here under consideration is sufficient and that said act therefore does not violate Constitution of Alabama 1901, Section 45.

Constitution of Alabama 1901, Section 104(29), reads in effect that the legislature shall not pass a local law "providing for the conduct

of elections or designating places of voting, or changing the boundaries of wards, precincts, or districts, except in the event of the organization of new counties, or the changing of the lines of old counties."

Here again, I see no constitutional violation brought about by the scope of the act considered. The conduct of elections here appears unaffected and changes of boundaries of the districts referred to in this section are obviously directed at voting districts. See *State v. Birmingham*, 160 Ala. 196, 48 So. 843.

It is therefore my opinion that the act is not violative of Constitution of Alabama 1901, Section 104(29).

Constitution of Alabama 1901, Section 105, reads as follows:

"Sec. 105. No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law."

In *State v. Bowles*, 217 Ala. 458, 116 So. 662, our Supreme Court held as follows:

" * * * (5) Sufficient to say now, it is settled, we think, by our decisions, that this section does not withdraw the legislative discretion to prescribe or change the governing agencies of counties by local legislation suited to the varied needs of counties of widely different conditions as to population, wealth and local requirements.

"(6) Such legislation need not be based upon enlargement or curtailment or governmental functions. General laws may already meet all the demands in that regard, and agencies may be provided by general law; yet, if a substantial object of the local law is to abolish one agency and invest its functions in another, to consolidate agencies, to provide additional ones to take over and reduce the labors of existing agencies or to create new ones deemed to be better fitted to exercise in whole or in part functions theretofore committed to an existing agency, such local act is not within the inhibition of section 105 of the Constitution. * *."

See also *Morgan County v. Edmonson*, 238 Ala. 522, 192 So. 274, and *Walker County v. Barnett*, 247 Ala. 418, 24 So. 2d. 665.

In view of the authority above cited, which I deem pertinent to the instant case, it is my opinion that the act here considered is not violative of Constitution of Alabama 1901, Section 105.

A further perusal of the act under consideration does not, in my opinion, warrant a discussion of other constitutional sections although it may be mentioned that a check of the original bill at the Office of the Secretary of State reveals proper notice and proof was published in compliance with Constitution of Alabama 1901, Section 106.

You are, therefore, advised that it is my opinion that Act No. 184, Local Acts 1945, page 101, is a valid enactment of the Legislature.

You also ask for an interpretation of the last two lines in Section 3 of the act which read as follows:

“* * and who shall have resided in that respective district for two years prior to the time he qualifies for such office.”

I am of the opinion that the legislative intent of the meaning of the above phraseology is that the referred to candidate shall have resided in the district for two years immediately prior to the time he qualifies for such office rather than during any preceding two years. In arriving at such a conclusion the practical purposes of the operation of the statute are looked to, which would, to my mind, be that a qualified candidate for Commissioner should have a current familiarity with the district from which he is offering for election.

“A legislative act is to be interpreted according to the intention of the Legislature apparent on its face. So the purpose and constitutionality of a statute, in whatever language it may be framed, ‘must be determined by its natural and reasonable effect.’” *Joseph v. Randolph*, 71 Ala. 499.

I find no Alabama case specifically on point, but this interpretation is given support by a 1942 decision of the Pennsylvania Supreme Court, *Commonwealth ex rel. Adams v. Stephens*, 345 Pa. 436, 28 A. 2d 924, which held a statute requiring that a borough comptroller must have been an elector of the borough at least four years “prior to his election,” to mean immediately prior to his election.

Yours very truly,

A. A. CARMICHAEL,
Attorney General.

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